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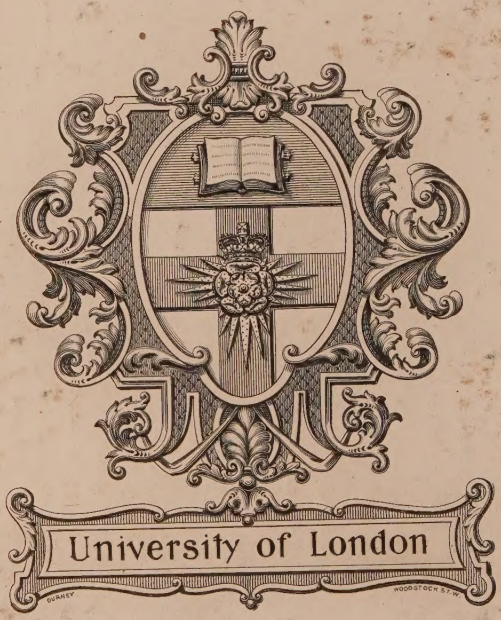

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1901.

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AND ON APPEAL THEREFROM IN THE

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DECISIONS ON

CROWN CASES RESERVED

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MEMORANDUM.

On Tuesday, January 22, 1901, *it pleased Almighty God to take to His mercy our late* Sovereign Lady Queen Victoria *of blessed memory.*

On Thursday, January 24, 1901, *it having been determined by the Lord Chief Justice, the Master of the Rolls, the Lords Justices, the President of the Probate and Divorce Division, and all the Judges in the Royal Courts assembled, except five Judges away on Circuit and at the Central Criminal Court, that on the demise of the Crown all judicial persons should be resworn on the oath of allegiance as well as on the judicial oath to* King Edward VII. *as soon as conveniently might be, the following were duly sworn by the King's Coroner in open Court in the Lord Chief Justice's Court:—*

Lord Alverstone C.J., *and* Mathew, Grantham, Lawrance, Wright, Bruce, Kennedy, Ridley, Phillimore, *and* Bucknill JJ.

The President of the Probate and Divorce Division, the Lords Justices, and the Chancery Judges were resworn on January 25 *before the Lord Chancellor in his private room.*

Feb. 15. The King *was pleased by several Letters Patent under the Great Seal to appoint and declare—*

That the persons who were appointed by Her late Majesty to be of Her Majesty's Counsel learned in the law should be of His present Majesty's Counsel learned in the law, with all such precedence, power, and authority as were originally granted to them.

ERRATA.

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295	9 from bottom	dele "estate."	
295	8 from bottom	the estate of the landed property	it.
318	13	were included	were not included.
381	foot-note	5 L. R. 2 Ex. 253	L. R. 2 Ex. 253.
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430 and 432	13 to 2	Administration of Charitable Trusts Act, 1853	Charitable Trusts Act, 1853.
431	11 from top	trustee of the plaintiffs	trustee of the managers.
443	2 from bottom	*Clement Williams & Co.*	*Clements, Williams & Co.*

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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1900. 1901.

CAMERON *v.* WIGGINS.

1900
Oct. 26;
Nov. 3.

Trade-mark—Merchandise Marks Act, 1887 (50 & 51 *Vict. c.* 28), *s.* 3—"*Trade Description*"—*Unintelligible Writing explained by Oral Statement.*

Although upon a sale of goods a purely oral indication of the country of their production will not amount to a trade description within the meaning of the Merchandise Marks Act, 1887, any writing or mark, however unintelligible without explanation, will, if orally explained by the vendor at the time of sale to be intended to indicate a particular country as the country in which the goods were produced, constitute a sufficient trade description for the purposes of the Act.

The appellant went into the shop of the respondent, a dealer in foreign meat, and asked for a leg of New Zealand mutton. The respondent handed him a leg of mutton, at the same time stating that it was New Zealand meat. The respondent also handed him an invoice in which the meat was described simply as a leg of mutton. The appellant then asked the respondent to mark on the invoice that it was New Zealand meat; whereupon the respondent wrote on it the letters "N. M.," intending thereby to represent that the mutton was New Zealand mutton. No

1900

CAMERON v. WIGGINS.

evidence was given that those letters bore that meaning according to any custom of the trade:—

Held, that under the circumstances the letters "N. M." amounted to a trade description of the meat within s. 3 of the Merchandise Marks Act, 1887, notwithstanding the absence of any trade custom as to their meaning.

CASE stated by justices for the borough of Blackpool.

An information was laid by Henry Cameron, the appellant, against Albert Wiggins, trading as Wiggins & Co., the respondent, charging that the respondent did unlawfully sell to the appellant a leg of mutton to which a false trade description, to wit "New Zealand mutton," was applied, contrary to the provisions of s. 2, sub-s. 2, of the Merchandise Marks Act, 1887.

Upon the hearing of the information the following facts were proved on behalf of the appellant:—

On March 16, 1900, the appellant saw the respondent at his, the respondent's, shop at Blackpool, and produced to him a handbill, of which, so far as is material, the following is a copy:—

"Canterbury Meat Stores,
126, Egerton Road, North Shore.
Beef, Mutton, Lamb, and Pork.
Wiggins & Co.

beg to inform the inhabitants of North Shore and district that they are selling the very best chilled beef and pork, Canterbury New Zealand mutton and lamb of the very best quality, at the following low prices: . . . Legs of mutton, 5*d*. and 5½*d*. per lb."

There were several similar handbills in the respondent's shop.

The appellant said to the respondent, at the same time producing and shewing to him the handbill, "I understand you are selling New Zealand mutton. I am desirous of procuring a leg of mutton; my wife objects to River Plate meat, and I want New Zealand mutton. Do you supply it?" The respondent said, "I do." The appellant then said, "Have you got a fresh leg you can supply me with—one that will keep over the end of the week?" The respondent replied, "I have one in this morning—it is perfectly fresh," and upon the request of the appellant produced to him a leg of mutton. He weighed it;

it was 7 lbs. The appellant then said to the respondent, "Please give me an invoice for it," and the respondent handed to him an invoice of which the following is a copy, except that the letters "N. M." were not then written thereon:—

"Dr. to Wiggins & Co.,
Family Butchers.
7 lbs. Leg Mttn. @ 5½*d*. . . . 3*s*. 2½*d*.
N. M.
Paid. A. S. W."

The appellant then said, "You have charged me 5½*d*. I see" (at the same time pointing to the handbill) "you have two charges—5*d*. and 5½*d*." The respondent replied, "Sometimes at the end of the week I have River Plate meat, and I charge 5*d*. for that and 5½*d*. for New Zealand legs." The appellant said, "Then I understand this is New Zealand mutton?" To which the respondent replied, "Yes." The appellant then said, "Do you mind marking on the invoice that this is New Zealand meat, so that I can shew my wife that I have bought New Zealand mutton at 5½*d*., and that I have not been supplied with 5*d*. meat at a higher price?" The respondent then wrote, with intent to warrant to the appellant that the mutton was New Zealand mutton, upon the invoice the letters "N. M."

No evidence was offered on behalf of the appellant that the letters "N. M." have any particular indication in the meat trade.

The mutton sold by the respondent to the appellant was not New Zealand mutton.

On behalf of the appellant it was contended that the giving of the invoice by the respondent to the appellant with the letters "N. M." written thereon with the intent aforesaid, and the production of the handbill by the appellant to the respondent under the circumstances above stated, and the reference thereto made at the time, constituted an application of a false trade description within the meaning of the Act, and that the mutton was sold with the false trade description applied.

The justices were of opinion that the letters "N. M." in

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the invoice did not constitute a trade description within the meaning of the Act by reason that, although they were written thereon by the respondent with intent to indicate to the appellant that the mutton sold to him and to which the invoice referred was New Zealand mutton, it was not established that according to the custom of the trade such letters are commonly taken to be an indication of the place or country in which the mutton is produced, and that the facts proved did not as matter of law amount to an application of the false trade description "New Zealand" mutton to the mutton so sold by the respondent to the appellant. They thereupon, without requiring the respondent to call any evidence, dismissed the information, subject to a case for the opinion of the Court.

Avory, for the appellant. The letters "N. M." were a trade description within the definition of that term in s. 3, sub-s. 1 (1). They were an indication as to the country in which the mutton was produced. The mistake which the justices made was in supposing that the earlier words of the definition were governed by the concluding words, and that a figure or mark, even though it may have been stated by the vendor that it was intended by him to indicate one of the several matters mentioned in the definition, could not, in the absence of evidence that it was commonly so understood in the trade, be treated as a trade description within the meaning of the Act. A trade description which is entirely oral is not enough: *Coppen* v.

(1) By the Merchandise Marks Act, 1887, s. 3, sub-s. 1, "The expression 'trade description' means any description, statement, or other indication, direct or indirect,

"(*a*) as to the number, quantity, measure, gauge, or weight of any goods, or

"(*b*) as to the place or country in which any goods were made or produced, or

"(*c*) as to the mode of manufacturing or producing any goods, or

"(*d*) as to the material of which any goods are composed, or

"(*e*) as to any goods being the subject of an existing patent, privilege, or copyright,

and the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of this Act."

Moore (*No.* 1) (1); but any written indication which is at the time explained by oral statement will suffice.

[KENNEDY J. The definition clause seems to deal with two classes of descriptions or indications—those which are unambiguous and speak for themselves, and those which, being ambiguous like a figure or mark, require explanation. Was it not the object of the section to confine the cases in which explanatory evidence might be given to cases in which it could be shewn that the ambiguous figure or mark bore a particular meaning according to the custom of the trade?]

No; the first part of the definition deals with those cases in which the writing is unambiguous, or in which, the writing being ambiguous, the vendor explains at the time what he intends it to mean. The concluding part deals with cases in which the writing is ambiguous, and the vendor does not explain its meaning; and then, in order to establish a primâ facie case against him, it is necessary to shew that the writing bears the particular meaning according to the custom of the trade.

No counsel appeared for the respondent.

Cur. adv. vult.

Nov. 3. LAWRANCE J. The question which we have to decide is whether, upon the facts stated in the case, the writing of the letters "N. M." upon the invoice amounted to a trade description of the meat which was the subject-matter of the sale within the meaning of the Merchandise Marks Act, 1887. The expression "trade description" is defined by s. 3, sub-s. 1, to mean "any description statement or other indication, direct or indirect," as to any of a variety of matters relating to the goods sold, including an indication "(*b*) as to the place or country in which any goods were made or produced," and the sub-section goes on: "and the use of any figure word or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of the Act." The

(1) [1898] 2 Q. B. 300.

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question is whether the last paragraph governs what precedes it, so as to exclude in all cases oral evidence as to the meaning of any figure, word, or mark other than evidence of its meaning according to a trade custom. I think it does not. It seems to me that the concluding paragraph was intended to apply to cases in which, apart from the custom of the trade, there is nothing to convey to the mind of the purchaser that the figure, word, or mark was intended by the vendor to have the particular meaning which is complained of, and that it has no application to a case in which the vendor by oral explanation made at the time of the sale intends to convey, and does in fact convey, to the mind of the purchaser that it was intended to have that particular meaning. If in this case the mutton had been sold simply with the letters "N. M.," and nothing had been said to shew what the letters "N. M." meant, I think that, in the absence of evidence that they were by the custom of the trade understood to mean "New Zealand mutton," there would be nothing to shew that the respondent had applied that trade description to it. But that was not the case. The letters were added in compliance with the appellant's request for the very purpose of indicating on the invoice that the mutton to which it referred was New Zealand mutton. In my opinion, therefore, the justices came to a wrong conclusion. But as the respondent was not required to give any evidence, and is entitled to produce evidence in his defence if he so desires, the case must go back to the justices to be reheard, but with the intimation that if the facts remain as already found by them there ought to be a conviction.

KENNEDY J. I concur, and have nothing to add.

Case remitted to justices.

Solicitors for appellant: *Mackrell, Maton, Godlee & Quincey.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1900
Oct. 24;
Nov. 1.

SEA INSURANCE COMPANY, LIMITED *v.* CARR.

Practice—Commercial List—Appeal.

An appeal will lie to the Court of Appeal against an order for entry of a cause in the commercial list if it be not a commercial cause.

APPEAL from an order of Mathew J. at chambers directing that the action should be transferred to the commercial list.

The action was brought in respect of the seizure of certain goods on board a ship in the Persian Gulf by H.M.S. *Lapwing*, of which the defendant was then in command. The defendant justified the seizure of the goods under a proclamation made by the Sultan of Muscat with regard to arms found in ships within the territorial waters of Muscat if intended for Persia or India, and under an alleged decree of a Court in Muscat. The plaintiffs had, as insurers under a policy of marine insurance, been compelled to pay the value of the goods seized to the shippers, and now sought to recover the amount so paid by them from the defendant on the ground that the seizure was wrongful. On the plaintiffs' application Mathew J. made an order directing that the action should be transferred to the commercial list, that points of claim should be delivered by the plaintiffs and points of defence by the defendant within seven days, that lists of documents should be exchanged between the parties in seven days, and inspection should be given in three days afterwards, and that the action should be tried without a jury. The Court of Appeal gave leave to appeal against the order.

The Attorney-General (*Sir R. B. Finlay, Q.C.*) and *R. B. D. Acland*, for the defendant. The cause of action in this case does not arise out of a commercial transaction, nor are the issues raised in it in any sense commercial. The questions involved are really important questions of constitutional and international law. The action is not one which can be said to

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arise out of the ordinary transactions of merchants or traders. One of the incidental circumstances of the case, no doubt, is that the goods in question were seized on board a ship; but that of itself cannot make the case a commercial cause. The notice issued in February, 1895, by the judges of the Queen's Bench Division making arrangements with regard to commercial causes has no statutory authority; but an order for the entry of a cause in the commercial list is, like any other order, the subject-matter of appeal: see *Barry* v. *Peruvian Corporation*. (1) The entry of a cause in the commercial list in practice involves certain modifications of the ordinary procedure with regard to pleadings, evidence, and discovery of documents, which are accordingly provided for by the order in the present case. These modifications of the practice may be desirable in the ordinary run of commercial cases, but are not suitable to a case such as this, and the judge had no power to order them without the defendant's consent.

[They also referred to *Baerlein* v. *Chartered Mercantile Bank*. (2)]

Joseph Walton, Q.C., and *Hollams*, for the plaintiffs. The direction that a case shall go into the commercial list is not an order in the sense that it can be the subject of an appeal. In *Barry* v. *Peruvian Corporation* (1) leave to appeal was refused, and therefore the decision does not involve the proposition that there can be an appeal in such a case. There is no such thing as a "Commercial Court," with a procedure and powers peculiar to itself. The arrangements made by the judges of the Queen's Bench Division with regard to the mode of dealing with commercial cases are not rules in the sense that they possess any statutory authority. They are merely arrangements made by the judges with a view to the convenient distribution and classification of business in their own Court. The judge, who by virtue of those arrangements has charge of commercial business, has no jurisdiction or powers further or other than those possessed by any other judge. The defendant is not prejudiced, nor is his position altered in any way by the entry of the case in the commercial list. The rules of practice and

(1) [1896] 1 Q. B. 208. (2) [1895] 2 Ch. 488.

of evidence are the same with regard to cases entered in that list as with regard to all other cases. It is true, no doubt, that, as a matter of practice, in regard to cases in the commercial list, certain modifications of the ordinary practice are generally made without objection; but the judge cannot enforce them upon a party who objects. The incidental matters contained in the so-called order, which are now objected to by the defendant, are not essential. The real question raised is whether the case is to go into the commercial list, the material consideration involved being that, if it does so, it will be tried by one of certain judges selected with a view to their experience of commercial matters. It does not follow that a cause is not a commercial cause because it does not involve questions of commercial law. If a cause involves questions of fact depending to a considerable extent on commercial practice or documents, it may be a commercial cause within the purview of the provisions made as to such causes. Bearing in mind that the whole question is really one of the convenient distribution of business amongst the judges of the Queen's Bench Division by arrangement amongst themselves, the question whether a cause is a commercial cause for the purpose of such an arrangement must be one for the discretion of the judge. It is impossible to give any definition of what constitutes a commercial cause. It is a matter of procedure and practice with regard to which the Court of Appeal will not, it is submitted, in the absence of any real injustice or prejudice to the defendant, interfere with the discretion of the judge. In the present case one of the principal questions of fact which may be involved, namely, whether the goods seized were bonâ fide destined for a certain port, may turn to a considerable extent on the terms of shipping documents and the course of mercantile business.

The Attorney-General was not called upon to reply.

EARL OF HALSBURY L.C. I am of opinion that the main point urged by the plaintiffs' counsel is not open to him in this Court, because we are bound by a previous decision of the Court in *Barry* v. *Peruvian Corporation* (1), the effect of which

(1) [1896] 1 Q. B. 208.

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appears to me to be that, with regard to an order of this character, the Court held that there is ground for an appeal, if the cause is not properly a commercial cause. It is true that the particular question in debate in *Barry* v. *Peruvian Corporation* (1) was not whether the cause was a commercial cause or not, but the ratio decidendi upon which the case was decided seems to me to involve a decision that there would be a right of appeal against the order for the entry of a cause in the commercial list if it were not really a commercial cause. I do not wish to be considered as expressing any dissent from that decision, for, as at present advised, I fully agree with it, but I think that this Court is precluded by it from going into the question raised by the plaintiffs' counsel. The question then arises whether, having regard to its particular circumstances, this is a commercial cause. It hardly appears to me to have been seriously argued that it is really such a cause. It may be true that there can be no definition of a "commercial cause." It would not, I think, be easy to define precisely what is really a matter of description with regard to the particular circumstances of a case, or to apply any definition to such a collection of facts as may be involved in the question whether a cause is a commercial cause or not. But on the other hand I think that there are causes which few business men would hesitate to pronounce not to be commercial causes. The present case appears to raise important points of international law, the question being whether the seizure of goods was justified under a proclamation of the Sultan of Muscat and the alleged decree of a foreign Court. The only element in this case which it seems possible to put forward as imparting to it a commercial character is that the goods, the seizure of which is complained of, were seized on board a ship. I do not think that that fact by itself constitutes the case a "commercial cause" or anything like a "commercial cause" within the meaning of the language of the rules, or, as they have been called, the arrangements made by the judges of the Queen's Bench Division with regard to commercial causes. I do not wish by anything I have said in this case to be supposed to

(1) [1896] 1 Q. B. 208.

express any doubt as to the great convenience of maintaining the arrangements for a Commercial Court in reference to cases to which they are properly applicable. In my opinion they are not properly applicable under the circumstances of the present case. For these reasons I think that the appeal should be allowed.

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A. L. SMITH M.R. and COLLINS L.J. concurred.

Appeal allowed.

Solicitors for plaintiffs: *Hollams, Sons, Coward & Hawkesley.*
Solicitor for defendant: *Treasury Solicitor.*

E. L.

Considered. MACDONALD *v.* GREEN [1951] 1 K. B. 594

[IN THE COURT OF APPEAL.]

C. A. 1900 *Nov.* 2, 5.

SAFFERY *v.* MAYER.

Gaming—Money paid in respect of Agreement void under the Gaming Act, 1845 (8 & 9 *Vict. c.* 109)—*Agreement by way of Gaming or Wagering—Gambling Partnership—Bets paid by one Partner—Claim for Contribution—Gaming Act*, 1892 (55 & 56 *Vict. c.* 9), *s.* 1.

Where one person advanced money to another for the purpose of making bets on horses on their joint account, and the money so advanced was lost on such bets:—

Held, that, by reason of the provisions of the Gaming Act, 1892, the person who had advanced the money could not maintain an action against the other for half of the amount so lost.

Tatam v. *Reeve*, [1893] 1 Q. B. 44, approved of.

APPEAL against the judgment of Darling J. in an action tried by him without a jury.

The action was brought by the trustee in bankruptcy of one Vautin upon three promissory notes made previously to the bankruptcy by the defendant in favour of the bankrupt.

It appeared from the evidence that the defendant had obtained from the bankrupt a sum of 500*l.* to be applied by the defendant in putting into operation a system for backing horses at races invented by him. The learned judge found upon the

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evidence that the money was advanced by the bankrupt as his contribution to a fund agreed to be used for backing horses in races for the joint benefit of the bankrupt and the defendant; that it was not a loan to the defendant, but was in the nature of a partnership capital to be used for the before-mentioned purpose. The defendant's system not proving successful, the whole of the money was lost on bets made by the defendant in pursuance of the arrangement between him and the bankrupt. The bankrupt subsequently wrote to the defendant as follows: "Am I right in stating that we went into the speculation on joint account, I finding the whole of the money in the meantime? That being so, you owe me 250*l*." The defendant gave the bankrupt the promissory notes sued upon to cover the amount so claimed by him. The defence set up was that there was no consideration for the making of the notes, the same having been given in respect of gaming transactions which were void under the Gaming Acts. The learned judge gave judgment for the plaintiff.

Abinger, for the defendant. The judge finds, and it is clear on the evidence, that no part of the 500*l*. was advanced by way of loan to the defendant. Therefore, in substance, the case is simply one where, there having been losses on bets made in the course of a joint gambling adventure in which the bankrupt and the defendant were partners, the bankrupt has paid the whole of the losses, and seeks to recover contribution from the defendant. The case is not distinguishable from *Tatam* v. *Reeve*. (1) The decision there shews that such a case is directly within the terms of the Gaming Act, 1892, and that the action is not maintainable.

Atherley Jones, Q.C., and *H. Kisch*, for the plaintiff. The correct view of the transaction on the evidence is that, the defendant not having the necessary means, the bankrupt advanced 250*l*. of the 500*l*. as the defendant's share of the capital for the purposes of the joint adventure, which was to be repayable, not upon the happening of any event, but absolutely, after the lapse of a reasonable time. Such an advance

(1) [1893] 1 Q. B. 44.

is not money paid under or in respect of a contract or agreement by way of gaming or wagering, and therefore is not within the Gaming Act, 1892.

Assuming that the transaction did not involve a loan to the defendant of 250*l.*, but that, as found by the judge, the 500*l.* was advanced by the bankrupt as his contribution to a fund to be used for the purposes of the joint adventure, still the case is not within the Gaming Act, 1892. The money was not paid by the bankrupt under or in respect of any wagering contract or agreement rendered void by the Gaming Act, 1845. At the time when it was paid, the wagering contracts or agreements were not in existence; the bets were not then made, and none might ever be made. The money was paid under or in respect of an agreement by the bankrupt and the defendant to carry on a business or adventure which was not illegal, as partners, i.e., on the terms that profits and losses should be shared equally: and the defendant is bound to bear half of the loss incurred. There is nothing illegal in the business of betting per se. In *Thwaites* v. *Coulthwaite* (1) Chitty J. granted an application for an account by one of the partners in a bookmaker's business. He could not have done that, if an agreement to carry on the business of betting was a gaming or wagering contract within the Gaming Act, 1845, and therefore void.

[They also cited *O'Sullivan* v. *Thomas* (2); *Burge* v. *Ashley & Smith, Limited* (3); *Carney* v. *Plimmer*. (4)]

Abinger was not called on to reply.

A. L. SMITH M.R. This is in substance an action brought by the trustee in bankruptcy of one Vautin to recover from the defendant a sum of 250*l.* paid by the bankrupt to the defendant. The defendant contends that the action is not maintainable by reason of the provisions of the Gaming Act, 1892. The question, therefore, is whether the case comes within that Act. The learned judge has found on the facts, and I see no reason to disagree with his finding, that the sum

(1) [1896] 1 Ch. 496.
(2) [1895] 1 Q. B. 698.
(3) [1900] 1 Q. B. 744.
(4) [1897] 1 Q. B. 634.

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of 500*l.* was advanced by the bankrupt as his contribution to a fund to be used for backing horses for the joint benefit of himself and the defendant; that is to say, that the arrangement was that the bankrupt should find the money, and the defendant should find the brains for a joint adventure, namely, backing horses upon the defendant's system. That being so, no part of the money paid by the bankrupt was a loan from him to the defendant, but the whole sum was paid on the footing which I have mentioned. The question is whether under these circumstances the half of the money so paid can be recovered by the plaintiff from the defendant. Certain cases have been cited to us, which, with the exception of *Tatam* v. *Reeve* (1), do not appear to me to have any application to the present case. I will deal first with the stakeholder cases decided under the Gaming Act, 1892. They were the cases of *O'Sullivan* v. *Thomas* (2) and *Burge* v. *Ashley & Smith, Limited* (3), in which latter case we were asked to review the judgment in *O'Sullivan* v. *Thomas* (2), and we held that it was right. In both those cases it was decided that, when the Legislature enacted in the Gaming Act, 1892, that an action should not be maintainable upon any promise, express or implied, to pay any person any sum of money "paid" by him under or in respect of any contract or agreement rendered null and void by the Act of 8 and 9 Vict. c. 109, they did not contemplate, in using the word "paid," the well-known system of depositing money with a stakeholder; that paying money and depositing money with a stakeholder were different things, and that it would be straining the language of the Act to say that the word "paid" as used in it covered such a deposit. These cases have, in my opinion, no bearing whatever on the present case, where it cannot possibly be contended that what the bankrupt did was to deposit money with the defendant as a stakeholder. I now come to the case of *Thwaites* v. *Coulthwaite*. (4) Reliance was placed for the plaintiff upon the fact that in that case Chitty J. ordered an account of the profits of a bookmaker's business to be rendered. I have

(1) [1893] 1 Q. B. 44.
(2) [1895] 1 Q. B. 698.
(3) [1900] 1 Q. B. 744.
(4) [1896] 1 Ch. 496.

two observations to make with regard to that case. One is that, though the case was decided in 1896, no reference appears to have been made to the Gaming Act, 1892. The other is that the argument addressed to the learned judge for the defendant seems to have been wholly based on the suggestion that the business carried on was illegal as contravening the provisions of the Betting Act, 1853, with regard to betting houses. It was argued for the plaintiff that, apart from any contravention of the provisions of that Act, there was nothing illegal in betting per se. All that Chitty J. held was that the business of a bookmaker, if not carried on so as to contravene the law with regard to betting houses, was not illegal; and he said in giving judgment: "At the end of his able argument Mr. Younger suggested that some question might arise on the taking of the account from the fact that some particular winnings might have been earned by illegal practices. I will leave that question—on which there seems to be no authority—open till it arises on the taking of the account." All that case decided was that the plaintiff was entitled to an account of the profits of the partnership business, and it does not in my opinion in any way touch the question raised in the present case. The case of *Tatam* v. *Reeve* (1), on the contrary, has a very strong bearing upon the present case. In that case the plaintiff at the request of the defendant paid sums due from the defendant to certain persons upon bets on horse-races, and sued to recover the amount so paid by him. A Divisional Court (Lord Coleridge C.J. and Wills J.) held that the case came directly within the terms of the Gaming Act, 1892, and that the action was therefore not maintainable. Lord Coleridge C.J. said: "All the sums of money were, as a matter of fact, due for bets which the defendant had made and lost. It was argued that the sums were not paid "in respect of" bets within the meaning of the Act of Parliament. I cannot feel any doubt or hesitation in coming to the conclusion that they were paid "in respect of a contract or agreement rendered null and void by 8 & 9 Vict. c. 109." Turning from the cases to the words of the Act itself, the Gaming

(1) [1893] 1 Q. B. 44.

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Act, 1892, enacts that "any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of the 8 & 9 Vict. c. 109 . . . . shall be null and void, and no action shall be brought or maintained to recover any such sum of money." What is the present transaction? The bankrupt paid the defendant a sum of money on the understanding that the defendant was to use it for backing horses at races upon their joint account. The Act 8 & 9 Vict. c. 109, s. 18, provides that "all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void." This agreement between the bankrupt and the defendant appears to me to be clearly a contract or agreement by way of gaming or wagering, and therefore the money paid by the bankrupt to the defendant was paid "in respect of" a contract or agreement rendered null and void by the Act of 8 & 9 Vict. c. 109. For these reasons I think that the judgment of Darling J. was wrong and that the appeal must be allowed.

COLLINS L.J. I am of the same opinion. It seems to me that, when the facts are ascertained, the case is a simple one, and really unarguable on the part of the plaintiff. The action is brought by a trustee in bankruptcy upon promissory notes made by the defendant in favour of the bankrupt. The bankrupt and the defendant being the immediate parties to the notes, the defendant sets up the invalidity of the original consideration for them, and the rights of the parties must be ascertained with reference thereto. The plaintiff cannot recover on the ground that the money was advanced by the bankrupt to the defendant as the defendant's share of a common fund to be used in betting. The facts as found by the learned judge negative this contention. The bankrupt and the defendant were partners on equal terms in a joint adventure, the bankrupt finding the money and the defendant finding the skill. What the plaintiff is in substance seeking to recover from the defendant is one-half of the losses, the whole of which the bankrupt has paid. The bankrupt paid by the hand of the defendant the

defendant's share of the losses as well as his own. These losses consisted of sums lost on bets made by the defendant on the joint account of himself and the bankrupt. The plaintiff is therefore seeking, as standing in the shoes of the bankrupt, to recover sums of money paid by the bankrupt in respect of contracts rendered null and void by the Gaming Act, 1845; and therefore the case comes exactly within the words of the Gaming Act, 1892, and the decision in *Tatam* v. *Reeve*. (1) The question that arose in the case of *Thwaites* v. *Coulthwaite* (2), before Chitty J., was whether he had jurisdiction to entertain an application for an account of profits in the case of the business of a bookmaker; and the only point argued was that he had not, because the business was an illegal one. He held that this was not necessarily so, but, in ordering an account to be rendered, he expressly reserved the right of the Court to deal with any items that, on taking the account, might appear to have relation to profits earned by illegal practices. As at present advised, I should think that an account might have been ordered in the present case; but that does not shew that the plaintiff could recover from the defendant a share of the losses paid by the bankrupt.

STIRLING L.J. I am of the same opinion. The grounds upon which I base my judgment are shortly these: first, this is really an action to recover from the defendant contribution to losses incurred by the bankrupt by reason of the payment of bets made by the defendant on the joint account of himself and the bankrupt; and secondly, that being so, the case is covered by *Tatam* v. *Reeve* (1), which, in my opinion, was rightly decided. The position is this. The defendant claimed to be the inventor of a scheme for winning money by betting on horses. He applied to the bankrupt to supply money for the purpose of putting the scheme into operation. The bankrupt placed in his hands a sum of 500*l.* to be used for that purpose for their joint benefit. The whole of this sum of 500*l.* was lost. The plaintiff, as the trustee of the bankrupt's estate, sues the defendant to recover one-half of the amount of that loss. The

(1) [1893] 1 Q. B. 44. (2) [1896] 1 Ch. 496.

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Stirling L.J.

learned judge has found on the facts, with regard to the terms on which the money was advanced to the defendant by the bankrupt, that it was not a loan to the defendant, but was in the nature of a partnership capital to be used for the purposes of the scheme. The learned judge was, in my opinion, perfectly right in the conclusion at which he so arrived upon the evidence. The letter written by the bankrupt to the defendant was treated by both parties as correctly stating the nature of the transaction, which seems to me to be a very intelligible one. The parties were to engage as partners in the adventure to be carried on by the defendant on their joint account, the bankrupt finding the whole of the money in the meantime, i.e., till the conclusion of the adventure. The suggestion for the plaintiff is that the arrangement was that the partners were to provide a partnership capital of 500*l.* in equal moieties of 250*l.*, and that to the extent of one moiety the advance was a loan from the bankrupt to the defendant. But I do not think that the evidence bears out that suggestion: the letter shews that the bankrupt was to provide the whole capital. What then is the legal result? In the case of *Tatam* v. *Reeve* (1) the plaintiff had at the defendant's request paid bets lost by the defendant, and sued the defendant for the amount so paid by him. It was held by the Divisional Court that the case fell within the Gaming Act, 1892, on the ground that the plaintiff was suing upon an implied promise by the defendant to repay money paid by the plaintiff in respect of contracts or agreements rendered null and void by the Gaming Act, 1845. In that case the plaintiff had paid the whole of the amount sued for on account of the defendant. In this case the bankrupt has by the defendant, his partner and agent, paid bets made by the latter on their joint account, and the plaintiff, as trustee of the bankrupt's estate, sues on an implied promise by the defendant to repay half of the amount so paid. It appears to me, that being so, that this case comes directly within the authority of *Tatam* v. *Reeve*. (1) The only question that remains is whether that case was correctly decided. The Gaming Act, 1892, enacts that "any

(1) [1893] 1 Q. B. 44.

promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of 8 & 9 Vict. c. 109 . . . . shall be null and void, and no action shall be brought or maintained to recover any such sum of money." The ground of the decision in *Tatam* v. *Reeve* (1) was that effect must be given to the words "in respect of" as well as to the word "under" in the Gaming Act, 1892, and that the action in that case was upon an implied promise to repay sums which had been paid "in respect of" gaming or wagering contracts. So likewise in the present case the action is upon an implied promise by the defendant to pay to the bankrupt a sum of money paid by him "in respect of" contracts or agreements made by way of gaming or wagering. I think that the reasoning of the judgment in *Tatam* v. *Reeve* (1) was entirely sound, and the conclusion there arrived at by the Divisional Court was correct.

Appeal allowed.

Solicitors for plaintiff: *Beyfus & Beyfus.*
Solicitor for defendant: *Cecil A. Lumley.*

(1) [1893] 1 Q. B. 44.

E. L.

C. A.
1900
Nov. 13.

[IN THE COURT OF APPEAL.]

CARRINGTON *v.* BANNISTER & CO.

Employer and Workman — Workmen's Compensation — Machinery used in loading from a Quay — Occupier — Person using Machinery — Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7—*Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *s.* 23, *sub-s.* 1.

The person using machinery in the process of loading a ship from a quay is an occupier of a factory within s. 23, sub-s. 1, of the Factory and Workshop Act, 1895, and therefore an "undertaker" within the Workmen's Compensation Act, 1897, s. 7.

APPEAL against an award of compensation by a county court judge under the Workmen's Compensation Act, 1897.

The appellants, Messrs. Edward Bannister & Co., were coal shippers at Grimsby. The respondent, Carrington, met with the accident, in respect of which he claimed compensation, in the course of his employment as one of a gang of men employed by the appellants for the purpose of unloading coal from trucks of the Great Central Railway Company into ships lying alongside the quay in Grimsby Docks. The coal was unloaded from the trucks and shot into the ships by means of a hoist and apparatus connected therewith on the quay side, worked by hydraulic power. This machinery belonged to the railway company, but the county court judge found that the appellants' gang had possession and sole control of the entire machinery until the job on which they were employed was finished—a period of two days. The appellants were paid by the railway company for unloading the trucks into the vessels, and by the owners of the vessels for trimming the coal when put on board. It was admitted for the appellants that the accident arose out of and in the course of the employment of the respondent on or about a "factory" within the meaning of the Workmen's Compensation Act, 1897, and the only point taken for the appellants was that they were not the occupiers of the above-mentioned machinery at the time of the accident, and there-

fore not the "undertakers" within the meaning of the Act. The appellants contended that the railway company, who were the owners of the machinery, were also the occupiers of it, the appellants having only such an occasional and temporary use of it as would not constitute them occupiers. The county court judge held that the appellants were at the time of the accident occupiers of the machinery within the meaning of the Factory and Workshop Acts, and that, as such, they were liable to compensate the respondent.

Ruegg, Q.C., and *E. L. Hartley*, for the appellants. This machinery was the property of the railway company, and they in point of law must be deemed to have been the occupiers of it at the time of the accident, the appellants being only permitted to use it temporarily for a particular purpose. (1) The provision at the end of s. 23, sub-s. 1, of the Factory Act, 1895, that "the person so using any such machinery shall be deemed to be the occupier of a factory," refers only to the machinery mentioned in clause (*b*) of the sub-section, and not to the machinery mentioned in clause (*a*). That this is so is shewn by the omission of the word "plant" which is coupled with machinery in clause (*a*). It cannot have been intended by the Factory and Workshop Act, 1895, that all the obligations created by the Factory and Workshop Acts with regard to fencing dangerous machinery and other matters mentioned in s. 23, sub-s. 1, should be imposed upon persons temporarily using machinery such as this belonging to a dock company, which would be the result if the respondent's contention is right. Such obligations would properly fall, and in general are imposed, by the Factory Acts on the occupier, in the ordinary sense of the term, to whom the property belongs, namely, the railway company in the present case. It could not have been intended that the burthen of fencing dangerous parts of

(1) The appellants sought to contend that their servants could not on the evidence be deemed to have been, in point of fact, in possession and control of the machinery at the time of the accident, but the Court of Appeal held that, there being some evidence to support the finding of the county court judge as to this, that finding was conclusive.

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hydraulic cranes should be imposed upon persons temporarily using them as the appellants did this machinery.

H. S. Cautley, for the respondent, was not called upon.

A. L. SMITH M.R. This is an appeal from the decision of a county court judge, who is omnipotent with regard to questions of fact, provided there is any evidence to support his finding. The question is whether the respondent, who has sustained injuries through an accident arising out of and in the course of his employment by the appellants in or about the machinery in question, is entitled to compensation under the Workmen's Compensation Act, 1897, from the appellants, as being at the time of the accident the occupiers of the machinery. It appears from the finding of the county court judge that the appellants were by their servants for the period of two days, during which the accident happened, in sole possession and control of this machinery. It is not disputed that it constituted under the circumstances a factory within the meaning of the Act. The sole point is whether for the purposes of the Act the appellants were occupiers of it. By the Workmen's Compensation Act, 1897, s. 7, sub-s. 1, it is provided that the Act shall apply only to employment by the undertakers as thereinafter defined, on, or in, or about (among other things) a factory. By sub-s. 2, "Factory" includes (among other things) any machinery or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895; and "undertakers" in the case of a factory means the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895. The question here really is whether the appellants were occupiers of this machinery within the meaning of the Factory and Workshop Act, 1895; for, if they were, they were "undertakers" within the meaning of the Workmen's Compensation Act, 1897. The Factory and Workshop Act, 1895, s. 23, sub-s. 1, provides that certain provisions of the Factory Acts "shall have effect as if (*a*) every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process; and (*b*) any premises on which

machinery worked by steam, water, or other mechanical power, is temporarily used for the purpose of the construction of a building or any structural work in connection with a building, were included in the word "factory," and the purpose for which the machinery is used were a manufacturing process, and as if the person who by himself, his agents, or workmen temporarily uses any such machinery for the before-mentioned purpose were the occupier of the said premises: and for the purpose of the enforcement of those sections the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same or forming part thereof, and the person so using any such machinery, shall be deemed to be the occupier of a factory." The machinery in the present case was clearly within clause (*a*) of the sub-section. It was contended by the appellants' counsel that the words "any such machinery" at the end of the sub-section only refer to the machinery mentioned in clause (*b*) of the sub-section, which is not applicable to the present case. I can see no reason whatever why the meaning of those words should be limited in the manner suggested, or why they should not refer to the machinery mentioned in clause (*a*). The appellants were, upon the findings of the county court judge, clearly persons using the machinery in question for the purposes mentioned in clause (*a*) of the sub-section, and, that being so, in my opinion they clearly were occupiers of a factory within the latter part of the sub-section. For these reasons I think the appeal must be dismissed.

COLLINS L.J. I am of the same opinion. It would be a remarkable result of the legislation contained in s. 23, sub-s. 1, of the Factory and Workshop Act, 1895, if, when the Legislature were by that sub-section constituting certain things factories for the purposes of the Factory Acts, for which purposes it was also necessary to define the occupiers of such factories, they should go out of their way to define the occupiers of one of the kinds of things so constituted factories twice over, and give no definition of "occupier" at all with regard to another. The sub-section creates two classes of factories by

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providing that certain provisions of the Factory Acts shall have effect as if the things mentioned in clause (*a*), namely, every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process; and the things mentioned in clause (*b*), namely, any premises on which machinery worked by steam, water, or other mechanical power, is temporarily used for the purpose of the construction of a building or any structural work in connection with a building, were included in the word factory, and the purpose for which the machinery is used were a manufacturing process. It then proceeds: "and as if the person who by himself, his agents, or workmen temporarily uses any such machinery for the before-mentioned purpose were the occupier of the said premises." The Legislature, therefore, have by those words constituted an occupier of the kind of factory which consists of premises on which machinery is used for the purpose mentioned in clause (*b*). They then revert to the former part of the sub-section, and proceed to create an occupier for the subject-matters mentioned in clause (*a*), with regard to which they have as yet created no occupier, by providing that "for the purpose of the enforcement of those sections the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same or forming part thereof, and the person so using any such machinery, shall be deemed to be the occupier of a factory." It appears to me that, if the words "any such machinery" in the last part of the sub-section did not apply to the machinery mentioned in clause (*a*), the result would be that there would be no definition of an occupier with regard to it, while "occupier" would be defined twice over for the purposes of clause (*b*) of the sub-section.

STIRLING L.J. I agree. The argument for the appellants was rested to a great extent on the omission of the word "plant" in the last part of the sub-section. But it is to be observed that, though that word is coupled with "machinery" in clause (*a*), the word "machinery" only is used throughout the rest of the sub-section, and the Legislature must have

treated "machinery" in the later part of the sub-section as including "plant." I do not think that any argument can be founded on the omission of the word "plant" as shewing that the words "any such machinery" at the end of the sub-section do not refer to the machinery mentioned in clause (*a*).

Appeal dismissed.

Solicitors for appellants: *Busk, Mellor & Norris, for Slater, Heelis, Williamson & Co., Manchester.*

Solicitors for respondent: *Rollit & Sons, for Brown & Son, Great Grimsby.*

E. L.

[IN THE COURT OF APPEAL.]

FERGUSON *v.* GREEN.

Employer and Workman—Compensation—Building constructed by means of Scaffolding—Structure of Trestles and Boards within Building—Whether Scaffolding Question of Fact for Arbitrator—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

By s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897, the Act is to apply (inter alia) to employment "on, in, or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding."

A new house more than thirty feet high had been roofed in and the external scaffolding removed. The applicant was engaged in plastering the walls and ceiling in one of the rooms, and in order to reach his work was standing on a structure of trestles with boards on them. While at work in this manner he met with an accident, for which he claimed compensation. An arbitrator appointed by a county court judge decided that the structure was not a scaffolding and refused to make an award of compensation, but referred the matter to the county court judge, who reversed the decision of the arbitrator and awarded the compensation provisionally settled by the arbitrator. On appeal:—

Held, that the question whether the structure was a scaffolding or not was a question of fact for the arbitrator, and that his finding was not open to review.

APPEAL from a decision of the judge of the Oldham County Court upon an application for compensation under the Workmen's Compensation Act, 1897.

The applicant was a working plasterer in the employment

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of a master plasterer who had contracted to do the plasterers' work to some cottages. The structure of the cottages had been completed and the outside scaffolding had been removed. Work was being done inside the cottages on the walls and ceilings, and at the time of the accident the applicant was plastering the walls and ceiling of a room in one of the cottages. He had constructed a platform by means of two trestles across which he had placed some boards, on which he was standing to do his work, and while at work in this manner an accident happened by which one of his eyes was severely injured. The county court judge before whom the application for compensation came referred it, under Sched. II., Provision II., of the Act, to an arbitrator, who heard the case and declined to make an award in favour of the applicant. The ground of his decision was that the building was not being constructed by means of a scaffolding within the meaning of s. 7 of the Workmen's Compensation Act, 1897, and that, therefore, the employment of the applicant was not one to which the Act applied. The arbitrator fixed the amount of compensation to be awarded should his judgment be pronounced to be wrong, and submitted the question whether he was right or wrong in law for the consideration of the county court judge. The matter having been remitted to the arbitrator, he stated that he had found as a fact that the arrangement used by the applicant was not a scaffolding. On the matter again coming before the county court judge, he was of opinion that the arbitrator had misdirected himself, for the question whether the arrangement of trestles and boards, used by the applicant, was a scaffolding within the meaning of the Act was a mixed question of law and fact, and not a mere question of fact, and that the judgment of the Court of Appeal in *Maude* v. *Brook* (1) shewed that the arrangement was a scaffolding. An award was therefore made, of the amount settled by the arbitrator, in favour of the applicant. The employers appealed.

Ruegg, Q.C., for the employer. Questions arising as to scaffolding have been before the Court in *Wood* v. *Walsh* (2),

(1) [1900] 1 Q. B. 575. (2) [1899] 1 Q. B. 1008.

Hoddinott v. *Newton* (1), and *Maude* v. *Brook*. (2) In each case the Court treated the question whether a particular structure was scaffolding as a question of fact for the arbitrator, not to be dealt with by the Court if there was any evidence on which the arbitrator could find as he did. In this case the decision of the arbitrator was on a question of fact. He did not misdirect himself by saying that the structure could not be a scaffolding: all he said was that it was not. The county court judge ought to have adopted that finding of fact; but he seems to have thought that wherever the Court of Appeal does not reverse a finding on a given state of facts, the finding is to be taken as conclusive whenever that state of facts arises again. If that were the rule the arbitrator would not be the judge of facts, but would have to follow the decision of some one else instead of deciding for himself.

B. G. Wilkinson, for the applicant. The facts in this case are not merely similar to those in *Maude* v. *Brook* (2), but identical with them. The arbitrator adopted the reasoning of Collins L.J. in that case, in which he dissented from the judgment of the majority of the Court, and acting on that view he misdirected himself, and his finding could be reviewed by the county court judge. The decision of the majority of the Court in *Maude* v. *Brook* (2) shews that the structure in the present case comes within the term "scaffolding" used in the Act.

A. L. SMITH M.R. This is an appeal by an employer who has been held to be liable to compensate a man who was plastering in a house by means of an arrangement of trestles and boards, and has sustained injuries while doing so. The county court judge appointed an arbitrator to settle the matter. Several points were raised upon the award of the arbitrator to which it is not necessary to refer, as they are not now in dispute. The point that is in dispute arises on the finding of the arbitrator that the arrangement of trestles and planks was not a scaffolding. On this ground he decided in favour of the employers that the applicant did not bring himself within the purview of the Act.

(1) [1899] 1 Q. B. 1018. (2) [1900] 1 Q. B. 575.

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From the earliest time at which this Court has had to give decisions on the Act it has consistently refused to give any definition of what is a scaffolding. The Legislature has delegated to a county court judge or an arbitrator questions of fact, and has only given to this Court power to deal with questions of law. If there is any evidence on which the county court judge or an arbitrator can deal with matters of fact, this Court will not interfere. From first to last this Court has dealt with the cases on the footing that whether a particular structure is a scaffolding is a question of fact. If we consider the three cases that have been referred to, it will be seen that the majority of the Court in *Maude* v. *Brook* (1), and the whole Court in the other two cases, refused to meddle with the finding of the arbitrator as to whether what was alleged to be scaffolding was so or not. I do not myself think that the facts in the case of *Maude* v. *Brook* (1) are distinguishable from those of the present case. There was in that case an arrangement of trestles and boards, and the person injured was using it for the purpose of plastering the walls of a building. The county court judge held that the arrangement was scaffolding, and Rigby L.J. and I came to the conclusion that there was evidence on which he might so find. Collins L.J. came to the conclusion that the existence of trestles and boards afforded no evidence of the existence of a scaffolding within the meaning of the Act. In the present case the arbitrator has found as a fact that there was no scaffolding; and the county court judge could not properly overrule the arbitrator on a question of fact any more than we could overrule the judge on a like question. Whether this case is identical in its facts with *Maude* v. *Brook* (1) or not, we cannot interfere with the finding of fact of the arbitrator, whose award must stand. The decision of the county court judge cannot be supported, and the appeal must be allowed.

COLLINS L.J. I am of the same opinion. The county court judge has applied in his judgment a good deal of reasoning

(1) [1900] 1 Q. B. 575.

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that I adopted in the cases referred to in argument, but I think that the net result of those cases is that an arrangement such as existed in *Maude* v. *Brook* (1), identical, as I think, with that which existed in the case before us, may come within the term "scaffolding," but that it is a question of fact whether it does so. The result is that no one is justified in excluding from the definition of that which might be scaffolding within the Act such an arrangement as existed in this case. I have myself always thought that the question whether a particular structure is or is not scaffolding must be a mixed question of law and fact, and on that point I am in agreement with the county court judge.

The law as it stands is that an arrangement, placed in a single room of a house that is being built or repaired, and from which the outside scaffolding has been removed, may be a scaffolding, and any judge or arbitrator directing himself that it could not be a scaffolding would be misdirecting himself. If he were to state that he had so directed himself, his decision would be open to review. The arbitrator says that he has not misdirected himself. He was, therefore, at large so far as the law is concerned, and was not bound to say that as a matter of law this structure was scaffolding, but was free to come to the conclusion, as a matter of fact, that it was not. Adopting loyally, as I do, the decisions of this Court, I do not see how he could so find in view of a precisely similar case in which the opposite conclusion was come to; but still it was a question of fact for him, with which the county court judge could not deal on appeal.

It seems to me that the county court judge has pushed the decisions too far in saying that this Court decided as a matter of law that such an arrangement as existed in the present case was scaffolding. The decisions do not go to that length, but, while saying that such an arrangement may be scaffolding within the meaning of the statute, they leave to the judge who has to try the case to say whether in the particular case it is scaffolding.

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STIRLING L.J. I have come to the same conclusion. I am bound by the decision of the majority of the Court in *Maude* v. *Brook*. (1) I conceive that case simply decides as matter of law that the arrangement as found in that case, and as occurring in this case, may be scaffolding, and not that it is so. The question whether it is or is not scaffolding is left in each case to be decided by the arbitrator as a question of fact. In *Maude* v. *Brook* (1) the arbitrator found that the arrangement was scaffolding, and the Court, being of opinion that there was evidence to justify the finding, refused to disturb the decision of the arbitrator. Here the arbitrator has come to the opposite conclusion. Acting on the authority of the case I have mentioned, and there being no decision of law that such an arrangement is scaffolding, we must leave the decision of the arbitrator undisturbed.

Appeal allowed.

Solicitor for applicant: *E. A. Wragg, Manchester.*

Solicitors for respondent: *W. Hurd & Son, for Payne, Galloway & Payne, Manchester.*

(1) [1900] 1 Q. B. 575.

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1900
Nov. 16.

BAILEY *v.* PLANT.

Employer and Workman—Workmen's Compensation—Default in Payment of Compensation—Committal Order, Jurisdiction to make—"Enforceable as a County Court Judgment"—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Sched. II.* (8.)—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5.

The memorandum of the compensation awarded by an arbitrator under the Workmen's Compensation Act, 1897, when recorded in the manner prescribed by Sched. II. (8.) of the Act, may be enforced by an order of committal under the Debtors Act, 1869, s. 5.

APPEAL from the decision of the judge of the Crewe County Court as after mentioned.

The appellant, Bailey, while in the employ of the respondent, Plant, had sustained injuries in respect of which he claimed compensation from the respondent under the Workmen's Compensation Act, 1897. An arbitrator appointed by the county court judge under that Act awarded the appellant a weekly payment of 2*s.* 6*d.* as compensation under the Act. A memorandum of the compensation awarded was duly registered under Sched. II. (8.) of the Act. Payments to the amount of 2*l.* 5*s.* having fallen into arrear, the appellant applied to the county court judge for a committal order against the respondent under the Debtors Act, 1869, s. 5. The county court judge was satisfied that the respondent had had the means to pay the amounts in arrear since they became due; but he held that the Workmen's Compensation Act, 1897, Sched. II. (8.), did not give him jurisdiction to commit the respondent, because a committal order could not be properly said to be a mode of enforcing a judgment of a county court, but was in the nature of a punitive proceeding for punishing a contumacious judgment debtor.

Minton Senhouse, for the appellant. (1) By the Workmen's Compensation Act, 1897, Sched. II. (8.), the memorandum of

(1) A doubt suggested itself to the Court at the commencement of the argument whether the right mode of procedure had been adopted by the

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the compensation awarded, when recorded, as therein provided for, "shall for all purposes be enforceable as a county court judgment." A committal order under the Debtors Act, 1869, is no doubt to some extent punitive, but it is intended to be a mode of enforcing the judgment by putting pressure on the debtor. [He cited *Ex parte Dakins* (1); *Cobham* v. *Dalton* (2); *Stonor* v. *Fowle.* (3)]

The respondent did not appear.

A. L. SMITH M.R. Assuming that the Court has jurisdiction in this case, as to which I give no opinion, on the footing that the case comes within the Workmen's Compensation Act, 1897, Sched. II. (4.), I think that the county court judge was wrong in deciding that he had no power to commit the respondent. The Workmen's Compensation Act, 1897, Sched. II. (8.), provides that the memorandum of the compensation awarded by the arbitrator, when recorded as therein provided, "shall for all purposes be enforceable as a county court judgment." One mode of enforcing a county court judgment no doubt is by writ of execution against the goods of the debtor. But there is another well-known process by which a debtor is coerced into obeying a county court judgment, namely, by committing him to prison under the Debtors Act, 1869. It is true that the jurisdiction to commit the debtor is fettered by the condition that it cannot be exercised, unless it is proved to the satisfaction of the judge that the person making default, either has, or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default. On that ground the county court judge appears to have thought that the order of committal is merely a punitive measure and not a mode of enforcing the judgment. I cannot agree with

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appellant in coming to the Court of Appeal under the Workmen's Compensation Act, 1897, Sched. II. (4). The point, however, was not argued, no one appearing for the respondent. The Court decided to dispose of the question raised by the appeal, but said that the case must not be taken as a precedent with regard to the mode of procedure to be adopted in such a case.

(1) (1855) 16 C. B. 77.
(2) (1875) L. R. 10 Ch. 655.
(3) (1887) 13 App. Cas. 20.

him there. I will assume that it is to some extent punitive in its character; but it does not follow, I think, that it is not a mode of enforcing the judgment. It is clearly in truth a mode of coercing the debtor into paying the judgment debt. Is not that a mode of enforcing the judgment? It is a mode by which, according to common knowledge, payment of small debts is constantly enforced in county courts. I am of opinion that the county court judge had jurisdiction to make an order of committal in this case.

COLLINS L.J. I am of the same opinion. I think that the process by which a debtor can be committed for non-payment of a judgment debt still continues to be what it was held to be in the case of *Ex parte Dakins*. (1) I will cite, as expressing the view taken by the Court in that case, the passage in the judgment of Williams J., where he says: "That satisfies my mind that the commitment is equivalent to an imprisonment under an attachment for non-payment of a debt, or, in other words, that it is substantially civil process." It appears to me that the provisions of the Debtors Act, 1869, are substantially the same as those of the statute there in question. The real purpose of the enactment is, in my opinion, to put pressure on the debtor to compel him to pay the debt. In the first place it must be observed that, however contumacious the debtor may have been, he can always, if he have means, avoid any consequences of his contumacy by paying the debt; which shews that the main object of the order of committal cannot be punitive, though to some extent it may have a punitive operation, because it leaves it open to the debtor to avoid punishment by paying the debt. Another important consideration is this. It is a principle underlying the whole criminal law that, when a criminal has undergone his punishment, his offence is purged. But, in the case of a debtor committed under the Debtors Act, 1869, the debt remains unsatisfied, although he has suffered the period of imprisonment mentioned in the committal order. These considerations shew, I think, that the governing purpose is to put pressure on the debtor to

(1) 16 C. B. 77.

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make him pay the debt. It is true that the Legislature has thought it right to limit the application of this mode of compelling the debtor to pay, by saying that it shall not be applicable, unless the non-payment of the debt is contumacious; but, when it is applicable, it is none the less a mode of enforcing the judgment, and not merely punitive. The procedure under the Debtors Act lacks two of the essential features of a criminal proceeding; because the debtor can elect to avoid punishment by paying the debt, and suffering the term of imprisonment does not destroy the debt. The essential object appears to be to coerce the debtor into payment of the debt. For these reasons I think the memorandum in this case may be enforced by committal.

STIRLING L.J. I am of the same opinion. I have not arrived at this conclusion without some doubt, because at first I was impressed by the reasoning of the learned county court judge, which, up to a certain point, appeared to me to be well founded. I agree with him that these committal orders are to a large extent punitive; but I do not think that involves the conclusion that they are not a mode of enforcing the judgment. The Workmen's Compensation Act, 1897, Sched. II. (8.) provides that the memorandum of the compensation awarded, when recorded, "shall for all purposes be enforceable as a county court judgment." The effect of the award appears to be in substance a direction to the respondent to pay certain sums by way of compensation to the appellant. Supposing that this were expressed in the form of a county court judgment, it would be an order of the county court upon the respondent to that effect. That would be an order of a court having jurisdiction to make such an order, to which obedience would be due from the person upon whom it was made. I think that, when the Legislature provided that the memorandum should be enforceable as a county court judgment, it meant that all means which a county court judge has for enforcing obedience to his judgments should be available to the person in whose favour the award operates. The point at which I differ from the learned county court judge is where he

says that the committal order is not a mode of enforcing the judgment of a county court. It is not in itself a mode of procuring satisfaction of the sum ordered to be paid, but it is nevertheless a mode, which under certain conditions is available, of compelling obedience to the judgment of the court. I think that the learned county court judge took too narrow a view of the meaning of the words "enforceable as a county court judgment."

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BAILEY v. PLANT.

Stirling J.

Appeal allowed.

Solicitors for appellant: *Taylor, Hoare & Pilcher, for R. R. Edleston, Crewe.*

E. L.

[IN THE COURT OF APPEAL.]

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MERRILL *v.* WILSON, SONS & CO., LIMITED.

Employer and Workman—Workmen's Compensation—"Factory"—Quay, Ship alongside of—"Undertakers"—"Actual Use or Occupation"—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-ss.* 1, 2—*Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *s.* 23, *sub-s.* 1.

Where the owners of a ship moored alongside of a quay, who acted as their own stevedores, had the use of the portion of the quay alongside of which their ship lay, for the purpose of unloading the ship's cargo on to the quay, and a workman employed by them was killed through an accident arising out of and in the course of his employment on the quay:—

Held, that the shipowners, having the "actual use" of a portion of the quay within the meaning of the Factory and Workshop Act, 1895, s. 23, sub-s. 1, were "undertakers" in respect of a factory within the meaning of the Workmen's Compensation Act, 1897, s. 7, and liable to make compensation to the dependants of the workman under that Act.

APPEAL from the decision of the judge of the Hull County Court under the Workmen's Compensation Act, 1897, as after mentioned.

The appellant, Merrill, was the widow of a workman who had been killed by an accident while in the employ of the respondents, Messrs. Thomas Wilson, Sons & Co., Limited, who were shipowners. A steamship belonging to the respondents

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came into the Alexandra Dock at Hull, which belongs to the railway company, on the morning of December 24, 1899, for the purpose of discharging her cargo, part of which consisted of cattle. She had no passengers on board. The respondents acted as their own stevedores for the purpose of loading and unloading their ships. The deceased man, whom the respondents were in the habit of employing in loading and unloading their ships, was at the time of the accident employed by them as one of a gang of labourers for the purpose of unloading cattle from the ship into lighters in the dock. As soon as the vessel was moored in her berth alongside of the quay, the deceased man and other members of the gang proceeded to place a gangway from the quay side to the ship for the purpose of going on board and commencing the work of discharging the cattle. The deceased man, while so engaged, tripped against something on the quay side, and, falling over the side, was so crushed between the quay and the ship that he died. The work of discharging the cargo, other than cattle, on to the quay did not begin till after the Christmas holidays. The gangway was not used for the purpose of loading or unloading cargo, but merely as a means of access from and to the ship for passengers, if any, and the crew and others. The appellant took proceedings for compensation in the county court under the Workmen's Compensation Act, 1897. The county court judge refused to award compensation, holding that the deceased man was at the time of the accident employed on or about a ship, and therefore the case did not fall within the Act.

W. H. Owen, for the appellant. The county court judge was wrong in holding that the deceased man was employed on or about the ship, when the accident happened, within the meaning of the decision in *Flowers* v. *Chambers*. (1) He had to perform duties on the ship no doubt, but he also had duties to perform on the quay, and, at the time when the accident occurred, he was undoubtedly employed on the quay.

(1) [1899] 2 Q. B. 142.

By the Workmen's Compensation Act, 1897, s. 7, the Act applies to employment by the "undertakers" in (among other things) a factory; and by sub-s. 2 a dock, wharf, or quay, to which the Factory and Workshop Act, 1895, applies, is constituted a "factory." By the same sub-section the term "undertakers" means in the case of a factory the occupier of the factory within the meaning of the Factory and Workshop Acts, 1878 to 1895. By s. 23 of the Factory and Workshop Act, 1895, a person who has "the actual use or occupation" of a dock, wharf, or quay is to be deemed to be the occupier of a factory. In this case the respondents clearly had the actual use of the quay; and therefore were the undertakers in respect of a factory.

It is contended, secondly, that the gangway was "plant" used by the respondents in the process of unloading the vessel within the meaning of s. 23, sub-s. 1 (*a*), of the Factory and Workshop Act, 1895, and therefore a "factory" about which the deceased man was employed within the meaning of the Act. [He cited on this point *Woodham* v. *Atlantic Transport Co.* (1)]

Joseph Walton, *Q.C.*, and *B. D. Kilburn*, for the respondents. It is not disputed for the respondents that the deceased man was employed on the quay when he met with the accident: nor, of course, is it disputed that a "quay" may be a "factory" within the Act. The real question is whether the respondents can be said, under the circumstances of this case, to have been the "undertakers" in respect of a "factory" within the meaning of the Act. The dock with its quays belonged to the railway company, and they were undoubtedly the "occupiers" of it in the proper legal sense of the term. Therefore the respondents cannot be said to have been the "undertakers" in respect of the quay under the word "occupation" used in s. 23, sub-s. 1, of the Factory and Workshop Act, 1895. Then can they be said to have had "the actual use" of the quay within the meaning of that sub-section? They, no doubt, "used" the quay in the popular sense of the word. But, so also, in a popular sense, a merchant, who sends a clerk to a ship lying

(1) [1899] 1 Q. B. 15.

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alongside a quay to present a bill of lading, or a consignee of goods, who sends a cart to receive delivery of them on the quay, may be said to use the quay. The use of a quay by the owners of a ship which comes into a dock, and has a berth temporarily assigned to her, is not such a use as is intended by the Act. It is the same in kind, though perhaps not in degree, as the use of the quay by any other person who has business there. The words "actual use" were probably inserted to prevent legal quibbles, and to make persons liable as undertakers in a case where, though they may not, in strict legal contemplation, have the "occupation," they practically have the use of the place to the exclusion of all others. Such words were necessary to provide for the case of some of the subject-matters included under the term "factory" by the Act, which could hardly be said to be capable of occupation in the legal sense, such as machinery used in loading and unloading. The "use" contemplated must be something which can be said to be analogous to "occupation." This cannot be said of the casual, temporary, use of a quay by a ship, any more than it could be said of the use of the quay by a shipper or consignee of goods as before mentioned. The shipowners are in such a case mere licensees. If a certain berth alongside of a quay were permanently reserved for and at the disposal of a particular line of ships, it might be more plausibly contended that that would be "actual use" of it within the Act, but there was not shewn to have been anything of that sort here. Such a subject-matter as machinery, which has no real analogy to a factory, and of which there cannot properly be "occupation," stands on a special footing, different from that of a dock, wharf, quay, or warehouse, or premises forming part of it. It is submitted that in their case the use or occupation contemplated must be something analogous to the occupation of a factory. In that sense the respondents cannot be said to use or occupy this dock or quay; nor do they use or occupy "any premises within the same or forming part thereof." The only sense in which they used the quay is the popular sense, namely, that an indefinite area of it opposite their ship was temporarily used, partly and not exclusively, for their purposes; in which sense

any one having business with the ship may also be said to use it.

[They cited on this point *Francis* v. *Turner Brothers*. (1)]

The gangway was clearly not "plant" coming within s. 23, sub-s. 1 (*a*), of the Factory and Workshop Act, 1895, for it cannot be said to have been used in the "process" of unloading at all, and, if it could, it clearly was not used in the process of unloading to the quay; for it was being used with a view to the unloading of the cattle into lighters.

W. H. Owen, for the appellant, was not called on to reply.

A. L. SMITH M.R. In this case it is in my opinion clear that the deceased was employed on or about the quay when the accident happened. It cannot be, and is not, disputed that the quay, on or about which he was so employed, was a "factory" for the purposes of the Workmen's Compensation Act, 1897. The real question raised is whether the respondents were "undertakers" for the purposes of that Act. The Workmen's Compensation Act, 1897, s. 7, sub-s. 1, provides that the Act shall apply only to employment by the undertakers as thereinafter defined, on, or in, or about (among other things) a "factory." Sub-s. 2 of s. 7 provides that "factory" shall include "any dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895"; and that "undertakers" in the case of a factory shall mean "the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895." As I have said, it is not disputed that this quay was a "factory" for the purposes of the Act. In order to see whether the respondents were the "undertakers" in respect of it, we must refer to the provisions of the Factory and Workshop Acts, 1878 to 1895. There does not appear to be any special definition in those Acts of the meaning of the term "occupier," which it is necessary to consider, till we come to the Factory and Workshop Act, 1895. Sub-s. 1 of s. 23 of that Act provides that certain provisions of the Factory Acts "shall

(1) [1900] 1 Q. B. 478.

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have effect as if (*a*) every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process; and (*b*) any premises on which machinery worked by steam, water, or other mechanical power, is temporarily used for the purpose of the construction of a building or any structural work in connection with a building, were included in the word 'factory,' and the purpose for which the machinery is used were a manufacturing process, and as if the person who by himself, his agents, or workmen temporarily uses any such machinery for the before-mentioned purpose were the occupier of the said premises; and for the purpose of the enforcement of these sections the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same or forming part thereof, and the person so using any such machinery, shall be deemed to be the occupier of a factory." It must be observed that the sub-section appears to draw a distinction between "use" and "occupation." The real question in the case is whether the respondents had the "actual use" of the quay, within the meaning of the Act, at the time when the accident happened. What is the use for which a quay is intended, if not for use by ships for the purpose of loading and unloading? Here we have the respondents' ship alongside of the quay, and monopolising the use of a portion of it for the purpose of unloading, and for as long a time as may be required, in fact for some days, the unloading being done by the respondents' men. The case is not at all analogous to the cases suggested in argument of a clerk sent down to a ship with a bill of lading, or of a cart coming upon the quay to take cargo away. The shipowners bring their ship alongside of the quay, and keep her there using the quay for the purpose of unloading till she is unloaded. Is it, or is it not, true to say that under those circumstances the shipowners have the "actual use" of the quay? The Legislature has used those words, and I see no ground which entitles us to cut down their natural meaning. I think we are bound to say that "use" means something other than "occupation" in the legal sense; and I cannot see my way to saying that the

respondents were not actually using the quay at the time when the accident happened.

Another point was raised. It was suggested that the appellant was entitled to succeed on the ground that the deceased man was at the time of the accident employed in unloading the ship by means of "plant"; that the gangway was plant used in the process of unloading to the quay. But in my opinion the appellant fails upon the facts with regard to this point. This gangway was not being used for the purpose of unloading the ship to the quay. It was put from the quay to the ship in order that a gang of men employed by the respondents might go on board to unload cattle from the ship into lighters on the further side of the ship. So that the appellant fails on that point. But for the reasons before given I think she is entitled to succeed on the other point, and that the appeal must be allowed.

COLLINS L.J. I am of the same opinion. The real question is whether the respondents were within the meaning of the Act "undertakers" in respect of a "factory" on, or in, or about which the deceased man was employed, when he met with the accident which caused his death. It was admitted by the respondents' counsel that the place where the man was employed was capable of being such a factory. Inasmuch as the Workmen's Compensation Act, 1897, expressly includes under the term "factory" (among other things) any quay to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895, it is impossible to dispute that for the purposes of the Act a quay may be a factory. The fact that the deceased man had duties to perform on the ship as well as duties to perform on the quay does not, as the county court judge seems to have thought, prevent his being employed on, in, or about the quay within the meaning of the Act, as he clearly was physically, at the time when the accident happened. We have then to see whether the place where he was so employed was a "factory," and whether the respondents were "undertakers" in respect of it. I think the two questions must necessarily be considered together in order to find the

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answer to them. The Act, by a somewhat rough process of legislation, makes the term "factory" cover a number of very different subject-matters; but I think they all have the common feature that they must be capable in some way of definition, not perhaps minutely, but sufficiently for practical purposes, with reference to area. Therefore I think that the term could not be applied to such a space as is the subject merely of what may be called "pedis possessio," though on a quay; as for instance the particular spot on which a man stood, or which he occupied in traversing a quay, when coming to the quay on such business as the presentment of a bill of lading. It is obviously impossible to apply the term "factory," as used in the Act, to such an undefinable area. In order to make the respondents liable, therefore, I think there must be some definable area in respect of which, if rightly defined, they can be said to be "undertakers" in respect of a factory. In the present case there was, as I have said, something capable of constituting a factory, if used in such a way as to present a sufficiently definable area. In the case of merely a few inches of standing room, or the space occupied by a cart on the quay, it would obviously be impossible to say that a person could use or occupy that as a factory. But, if the space of quay used were the length of a ship, I do not see why it should not be capable of being considered a factory within the Act. Then the question remains, whether the respondents were the "undertakers" within the meaning of the Act. The Workmen's Compensation Act, 1897, provides that in the case of a factory, "undertakers" means the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895. The definition upon which this case turns is to be found in s. 23, sub-s. 1, of the Factory and Workshop Act, 1895. That sub-section says that the person having "the actual use or occupation" of (among other things) a quay, shall be deemed to be the occupier of a factory. In order to see whether a person has the "actual use or occupation" of a subject-matter within the Act, one must, I think, necessarily consider the nature of the subject-matter of which it is alleged that he has the use or occupation: because the question, whether a person

has the use of that subject-matter in the sense of using it as a factory within the Act, must, I think, have reference to the essential purpose for which it exists and for which it is ordinarily used. A dock or quay exists and is used for certain well-known purposes, which do not generally involve, no doubt, the absolute exclusion of persons other than the shipowners and their servants and licensees from the area used, but which do practically involve the exclusion of others from the area used as regards those purposes, namely, loading and unloading the ship. In this case we have a ship moored alongside of a quay, and, for the whole length of the ship, the quay side is devoted to the use of the shipowners for the purpose for which quays are used, namely, for the unloading and loading of the ship and other matters ancillary thereto. If that is not "actual use" of the quay, I do not see what can be. The Act does not insist on more than "actual use" of the quay, for the collocation of those words disjunctively with the word "occupation" involves that "use" must mean something less than legal occupation. I think that full effect is given to the words of the Act by holding them to apply to the exclusive use of part of the quay by the shipowners as regards the purposes of unloading and loading, which practically involves the exclusion of most other persons, though not necessarily of all. At the time when the accident happened to the deceased man, the respondents appear to have had substantially the full enjoyment of a definable portion of the quay, namely, that beside which the ship lay, for the essential purpose for which the quay was intended, to the exclusion of any use of it by others for that purpose. I think, therefore, that all the necessary elements existed to make them "undertakers" in respect of a "factory" within the meaning of the Act.

With regard to the other point that was taken, I agree with what the Master of the Rolls has said. Assuming that a "gangway" would be plant within the words "machinery and plant" in the Factory and Workshop Act, 1895, a difficulty, perhaps, arises from the fact that the gangway in this case could only be said to have been used for a purpose indirectly ancillary to the process of unloading the ship; but an absolutely

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fatal difficulty appears to be that it was not used for the purpose of unloading to the quay, but for the purpose of men going on board to unload cattle into lighters on the other side of the ship. It would be useless for the appellant to make out that the gangway was used in the process of unloading, or as ancillary thereto, unless she could also shew that the unloading in which it was used was to the quay.

STIRLING L.J. I agree. I think that the respondents were persons having the "actual use" of the quay within the meaning of the Factory and Workshop Act, 1895, and therefore were "undertakers" in respect of a factory within the meaning of the Workmen's Compensation Act, 1897. I agree also on the other point, because I think that the gangway was not used in the process of loading or unloading from or to the quay.

Appeal allowed.

Solicitors for appellant: *Williamson, Hill & Co., for T. & A. Priestman, Hull.*

Solicitors for respondents: *Pritchard & Sons, for Heathfield & Lambert, Hull.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1900
Nov. 8.

WHYLER *v.* THE BINGHAM RURAL DISTRICT COUNCIL.

Local Government—Highway—Dangerous Locality—Removal of protecting Fence—Misfeasance—Liability of Highway Authority.

A fence had been formerly erected, by the then existing highway authority, to protect the public using a highway which was dangerous, owing to its liability to be flooded by a stream that ran by the side of the road. The stream was diverted, but the ditch where the former bed of the stream had been was still liable to be filled in time of flood, and the water then flowed over the road. After the fence had been in existence for a number of years, the defendants, adopting the report of their surveyor that the fence was in bad repair, that it was no longer necessary, and that all that was required was the erection of a short length at each end, ordered that the work should be done. The fence was removed, and three weeks later and before any new fence had been put up the road was flooded. A man driving along the road drove into the ditch and was drowned. In an action by his administratrix to recover damages for his death, the jury found that the removal of the fence under the circumstances, and in the way in which it had been done, was inconsistent with reasonable regard for the safety of persons using the road. Judgment was given for the plaintiff. On appeal:—

Held, that the defendants were liable.

Application by the defendants for judgment or a new trial in an action tried before Wills J. with a jury.

The action was brought by the widow and administratrix of a deceased man to recover damages for his death, alleged to be caused by the wrongful and negligent acts and defaults of the defendants, who were the highway authority of the district of Bingham.

Within the district of the defendants there was a road by the side of which in the year 1877 there was a stream which in times of flood covered the road with water. The then existing highway authority, on the report of their surveyor that the road was dangerous, erected a post and rail fence by the side of it next to the stream, in order to protect persons passing along the road in time of flood. Subsequently the stream was

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diverted, but in times of flood the ditch, which had formerly been the bed of the stream, was still filled with water which flowed thence over the road. In 1899 the surveyor of the defendants reported that the fence was in bad repair and would cost a considerable sum to put in order, but that in his opinion the fence was not needed except for a short length at each end of the part fenced, and that sufficient rails and posts could be got from the old fence to do all that was required. The surveyor said in his evidence that it was his intention to have left posts at certain distances by the side of the highway, as a guide to shew the course of the metalled road when the water was over it. The defendants ordered that the work mentioned by the surveyor in his report should be done, and on January 26, 1900, the old fence was taken down. Nothing was done to replace any portion of the fence before February 16, on which date flood water had filled the ditch and flooded the road. On the evening of that day the deceased was driving along the road, and drove into the ditch and was drowned. The evidence shewed that the deceased knew that the fence had been taken down, and had discussed the dangerous state of the road. The learned judge asked the jury whether the removal of the fence in such a way and under the circumstances under which it was removed was consistent with reasonable regard to the safety of persons using the road, and told them that if they answered that question in the negative their verdict should be for the plaintiff. The jury found a verdict for the plaintiff for 250*l*. The learned judge held that the defendants were liable in law, and gave judgment for the plaintiff.

The defendants appealed.

Hugo Young, *Q.C.*, and *W. Appleton*, for the defendants. The defendants are not liable for not fencing the road: *Cowley* v. *Newmarket Local Board* (1); *Thompson* v. *Brighton Corporation*. (2) Their predecessors put up the fence, but there was no duty on the defendants to maintain it: *Rex* v. *Llandilo Commissioners* (3); *Wilson* v. *Halifax Corporation*. (4) The

(1) [1892] A. C. 345.
(2) [1894] 1 Q. B. 332.
(3) (1788) 2 T. R. 232; 1 R. R. 466.
(4) (1868) L. R. 3 Ex. 114.

accident arose either from an omission to fence, which would be an act of non-feasance, or from the taking away of the fence, which was not an act of misfeasance, because there was no duty cast on the defendants to protect the public from danger by fencing the road. The accident happened about three weeks after the removal of the fence, but it might have happened twenty years afterwards, and it would be unreasonable in such a case to say that the misfeasance caused the accident. The short length of time that elapsed cannot affect the question of the liability of the defendants. There was nothing to shew that the fence was not on land of an adjacent owner, on whom the duty of protecting the public from danger would be thrown. The consequence of holding the defendants liable would have wide-reaching effect, considering the miles of roads in the fen country that are bounded by ditches. The real point in this case turned on the question of the absence of a fence; but the learned judge left the case to the jury as if it concerned a private individual, and the question was whether it was reasonable that he should fence. The putting up of posts by a surveyor of highways to guide the public in cases where roads are subject to floods is dealt with in s. 24 of the Highway Act, 1835 (5 & 6 Will. 4, c. 50); and by s. 6 of the Highway Rate Assessment Act, 1882 (45 & 46 Vict. c. 27), the expenses incurred by a highway authority in this respect may be charged on the highway rate; but those provisions do not apply to this case, for they do not make the authority liable, for they are enabling and not obligatory.

Etherington Smith, for the plaintiff. The predecessors of the defendants put up the fence to protect the public. The defendants determined to alter the character of the protection, and in doing that they took down the old fence, but did not put up the new within a reasonable time. The matter that the defendants were engaged in was one entire transaction, and in carrying it out they were guilty of misfeasance in leaving the place unprotected. The cases cited do not conflict with the principle that governs this case, which is that the defendants were negligent in carrying out the substitution of one form of protection for another. The decision that the

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defendants were liable could only have effect in similar cases, and would not touch the general question of liability to fence dangerous roads. There was no evidence to shew that any adjoining owner was liable, and it would certainly be presumed that the highway authority put up and removed the fence on land over which they had control.

Hugo Young, *Q.C.*, in reply.

A. L. SMITH M.R. This is an appeal from a judgment of my brother Wills on a verdict by a jury in favour of the plaintiff. There is no question that the defendants stand in the same position as that in which highway surveyors formerly stood, and that their liability is neither greater nor less than that which attached to surveyors. As long ago as the case of *Russell* v. *The Men of Devon* (1) it was decided that surveyors of highways were not liable for non-feasance. The question in the case is whether the plaintiff has not proved that the district council were guilty of misfeasance. The facts proved were that in 1877 there was a stream, where there is now a back-water, by the side of the road, and that in flood time the stream overflowed the road. This was represented to the district authority as a danger to the public, and a post and rail fence was put up by the highway authority to protect persons going along the road in time of flood. It is said they were not liable to do this, and I do not say that they were under any obligation to erect a fence. It is true that in s. 24 of the Highway Act, 1835, there is a provision as to the duty of the surveyor with respect to highways that are liable to floods, but I am not sure whether that applies to the present case. There is s. 6 of the Highway Rate Assessment Act, 1882, which looks as if the district authority had power to put up posts and to charge the expense upon the highway rate; but it is said that it would be optional whether they would do so or not, and I am not going to decide on any question of liability under that Act. The defendants' predecessors put up the fence, and it existed for twenty-two years; and then the defendants, on the report of their surveyor, took it down. A minute of October 12,

(1) (1788) 2 T. R. 667; 1 R. R. 585.

1899, shews that they ordered this to be done, and that, acting on the report of their surveyor, they directed that posts and rails should be put up at each end of the place from which the fence was to be removed. On January 26, 1900, their order as to taking down the fence was carried out, but nothing was done as to putting up anything. Nothing had been done up to February 16, at which time there was a flood which covered the road, and the deceased, driving along the road, drove into the ditch and was drowned. It was said that the act of the defendants was a mere act of non-feasance for which no action will lie, because the only thing that the plaintiff can complain of is that they did not put up the proposed new fence. The plaintiff, on the other hand, complains of the act of the defendants in pulling down the existing fence as an act of misfeasance. In my judgment, the death of this man was caused by the defendants doing that which was a misfeasance—that is, by their act in pulling down the old fence. If they had not done this the man would not have been drowned. Wills J. left a question to the jury to see if what was done was an act of misfeasance. The jury found the removal of the fence by the defendants in the manner and under the circumstances under which it was removed were not consistent with a reasonable regard to the safety of persons using the road. In my opinion, on this finding of the jury, the learned judge was right in holding that the defendants were liable for a misfeasance. The verdict and judgment must stand, and the appeal be dismissed.

COLLINS L.J. I am of the same opinion. The short point in this case is whether the deceased man met with his death by reason of an act of misfeasance on the part of the defendants. Unless the plaintiff can prove two things—that there was an act of misfeasance committed by the defendants, and that the death was due to that act—the plaintiff's case must fail. Admitting, as we must admit on the authorities, that the only liability on a highway authority is for acts of misfeasance, and that there is no liability for acts of non-feasance, we have to approach this case on the footing that the defendants were not

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bound to put up a fence by the side of the road. Their predecessors had in fact put up a fence, because they thought it was required to protect from danger those of the public who used the highway. In the exercise of their powers as highway authority they turned that which was an unsafe highway into a safe one. The defendants by their act have turned the highway that was safe, and which was not a source of danger to the public, into one that is dangerous, and they have done this by taking away the protecting fence. It seems to me that this may properly be termed an act of misfeasance on the part of the defendants, and, further, that the death of deceased was the result of the misfeasance. The argument as to the length of the interval that might elapse between the taking away of a fence and an accident arising from the absence of a fence does not carry the case for the defendants far enough. There was an omission of one element in the case so put, which is that the fence was only necessary when the floods were out; so that we have in this case the mischief arising at the very time of the act of misfeasance. The case might be very different if a long interval had elapsed, so that there would be difficulty in tracing the accident to the act of misfeasance.

STIRLING L.J. concurred.

Appeal dismissed.

Solicitor for plaintiff: *G. E. Wright-Motion, for Charles Stroud, Nottingham.*

Solicitors for defendants: *Mason, Edwards & Mason, for R. H. Beaumont, Nottingham.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1900
Oct. 26;
Nov. 2.

In re MILLER.

Bankruptcy — Petition — Act of Bankruptcy — Suspension of Payment — "Notice" — Verbal Admission of Insolvency — Debt — Payment on a Contingency — Future Partnership — "Liquidated Sum" — Damages — Petitioning Creditor's Debt — Loan by one Partner to another, Recovery of — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*h*); *s.* 6, *sub-s.* 1 (*b*) — *Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 3.

Under an agreement made in January, 1900, between M., a stockbroker, and T., with a view to T.'s ultimately becoming a member of the Stock Exchange and entering into partnership with M., T. paid 2000*l.* into M.'s banking account, subject to a condition that if T. should not, on or before September 29, 1900, become a member of the Stock Exchange, or if, having become a member, he should not be at liberty to enter a partnership within that period by reason of his recommenders withholding their consent, then and in either of those cases T. should have the option of determining the agreement by notice, whereupon the 2000*l.* should be repaid by M.

On June 28 M. was "hammered" on the Stock Exchange, and on July 3 he told T. in conversation that "he was utterly penniless," that "he could not pay anybody," and that "he had lost everything." Thereupon T., without having given any notice purporting to determine the agreement, presented a bankruptcy petition against M., alleging that M. was indebted to him "in the sum of 2000*l.* lent by him to M. pursuant to the agreement," and that the act of bankruptcy was that the debtor gave him "notice" on July 3 of having "suspended payment of his debts":—

Held, that the alleged debt of 2000*l.* was not "a liquidated sum, payable either immediately or at some certain future time," within s. 6, sub-s. 1 (*b*), of the Bankruptcy Act, 1883, and was therefore not sufficient to support the petition, and that on July 3 T.'s only remedy was in damages for breach of the agreement:

Held, also, by Lord Alverstone C.J., that if on July 3 T. had been in fact a "creditor" of M., the statement then made by M. to T. would have been a "notice" of suspension of payment constituting an "act of bankruptcy" within s. 4, sub-s. 1 (*h*).

By an agreement made on January 20, 1900, between Samuel Miller, a stockbroker, of the one part, and Victor Talbot of the other part; after reciting that Talbot was desirous of becoming a member of the Stock Exchange and, when he should have become a member thereof, of entering into partnership with

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Miller (who was then carrying on business as a stockbroker at No. 23, Cornhill) for the purpose of carrying on the business of stockbrokers; it was mutually agreed (1.) that, subject as thereinafter provided, Talbot and Miller should, if and when Talbot should become a member of the Stock Exchange, provided such event occurred before March 31 then next, enter into partnership together as stockbrokers; (2.) that Miller should, immediately after the signing of the agreement, pay into his account at the London City and Midland Bank, Limited, the sum of 2000*l.* for the purposes of his said business of a stockbroker, and should not use the same otherwise than as and for working capital of the said business; (3.) that Talbot should, immediately after Miller had paid into the said bank the said 2000*l.*, pay into the said bank the sum of 2000*l.* in the joint names of himself and Miller.

Clause 4 provided for the payment of interest on the latter 2000*l.* by Miller to Talbot at a certain rate, which was fixed by a subsequent agreement of April 23, 1900, at 10 per cent., and for payment of 4*l.* a week to Talbot on account of that interest.

By clause 5 it was agreed that the 2000*l.* provided by Talbot should be used by Miller for the purposes of his business of a stockbroker then being carried on by him, but not for any hazardous or speculative purpose or otherwise.

Clauses 6 and 8 of the agreement were in the following terms:—Clause 6: "If the said Samuel Miller shall use the said sum of 2000*l.* provided by him otherwise than as working capital for his said business as provided by clause 2 hereof, the said Victor Talbot shall have the option (at any time after such breach) of cancelling this agreement by notice to the said Samuel Miller left at his office, No. 23, Cornhill, aforesaid, and upon such notice being given the said Victor Talbot shall be at liberty to draw out his said sum of 2000*l.*, and for that purpose the said Samuel Miller shall sign and do all necessary documents and things, and the said Samuel Miller shall forthwith pay to the said Victor Talbot any part of the said sum of 2000*l.* which may have been withdrawn, together with interest at the appropriate rate on the said sum of 2000*l.* up to the date of

the repayment thereof to the said Victor Talbot, and thereupon this agreement shall be at an end."

Clause 8: "If the said Victor Talbot shall not on or before the 31st day of March next become a member of the Stock Exchange, or if, having become a member, he shall not be at liberty to enter into a partnership within that period by reason of his recommenders withholding their consent, or if the said Samuel Miller shall not be at liberty to enter into the said partnership by reason of his recommenders withholding their consent, then and in either of the said cases the said Victor Talbot shall at any time after the 31st day of March next have the option (to be exercised by notice to the said Samuel Miller to be given as aforesaid) of determining this agreement, and thereupon the said sum of 2000*l.* so to be paid by the said Victor Talbot as aforesaid, and all other moneys provided by the said Victor Talbot, together with interest at the rate of 10 per cent. per annum up to the date of repayment shall be returned and paid by the said Samuel Miller to the said Victor Talbot, and this agreement shall be at an end."

The date of March 31 fixed by the agreement for the contemplated commencement of the partnership was by the subsequent agreement of April 23, already mentioned, extended to September 29. Miller having paid his 2000*l.* into his banking account, Talbot paid his 2000*l.* into Miller's bank in the joint names of himself and Miller, but subsequently this 2000*l.* was transferred into Miller's own account. From the date of the agreement Miller carried on the business of a stock-broker. On June 28, in consequence, it was said, of the failure of a client to pay a sum of 2000*l.* due from him, Miller was "hammered" upon the Stock Exchange. On July 1 Talbot wrote to Miller asking for 8*l.*, being two weeks' payment on account of interest under clause 4 of the agreement, and in reply on July 2 Miller wrote informing Talbot that he had been "hammered," that he was "in a dreadful way," and that his affairs were in the hands of the official assignee of the Stock Exchange. On July 3 an interview took place between Miller and Talbot, at which (according to Talbot's evidence, which was not contradicted) Miller told Talbot that he was "utterly

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penniless"; and when Talbot asked him if he could give him any money, Miller stated that "he could not pay anybody," and that "he had lost everything."

Talbot never gave Miller any notice purporting to determine the agreement; but on July 5, 1900, he presented a petition in bankruptcy against Miller, alleging that Miller "was indebted to him in the sum of 2000*l.* lent by him" to Miller pursuant to the agreement, and that the act of bankruptcy was that the debtor gave notice on July 3, 1900, to him, Talbot, that "he had suspended payment of his debts."

On August 10, 1900, the registrar made a receiving order on the petition.

Miller appealed.

The appeal was heard on October 26, 1900.

Herbert Reed, Q.C., and *F. M. Abrahams*, for Miller. The first question is whether Miller has given notice of having suspended payment within the meaning of s. 4, sub-s. 1 (*h*), of the Bankruptcy Act, 1883, which says that an act of bankruptcy is committed "If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts." The only notice alleged here is the statement made by Miller to Talbot; but that is not a sufficient notice within the Act. There must be a formal business-like notice to the creditor by the debtor that he cannot and will not pay: a mere statement in conversation will not do. The section is intended to apply, not to a statement to a single creditor, but to a statement to the creditors as a class, and there is no such statement here, but only a statement that the debtor cannot pay this one particular creditor: it was a mere friendly communication by one friend to another of the disaster that had befallen the joint adventure. It has been decided by *In re Scott* (1) that a verbal statement by the debtor, to amount to a notice within the section, must be one that he cannot pay his debts, and that he intends to deal with his creditors generally.

Then, secondly, there was not a good petitioning creditor's

(1) [1896] 1 Q. B. 619.

debt. Sect. 6, sub-s. 1 (*b*), of the Act says that "a creditor shall not be entitled to present a bankruptcy petition against a debtor unless the debt is a liquidated sum, payable either immediately or at some certain future time." Here the 2000*l.* was not a debt of that description, for under clause 8 of the agreement of January 20, as modified by the subsequent agreement, the event on which the money was to be repayable has not yet arrived, nor can it now be fixed. The agreement does not say that if M. is "hammered" the 2000*l.* shall immediately become payable, and the agreement has never been determined by any notice by Talbot. Moreover, if this sum is to be treated as a loan from one partner to another, then, under s. 3 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), the lender cannot recover the loan from the bankrupt borrower until the claims of the other creditors for value have been satisfied. Sect. 2 of that Act provides that "the advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from the business, does not of itself make the lender a partner." And then s. 3 provides that, in the event of the person to whom money has been advanced by way of loan being adjudged bankrupt, "the lender of the loan shall not be entitled to recover anything in respect of his loan" until the claims of the other creditors for value have been satisfied. Here, in order to maintain Talbot's position as a creditor at all, it is incumbent upon him to prove that he has a chance of getting something out of the administration of the estate after payment of the other creditors. In short, a person who is postponed under the last-mentioned section cannot prove for any purpose at all until every one else is paid in full: he cannot prove in competition with the other creditors of the borrower; and that was also the law under s. 5 of Bovill's Act, the Partnership Law Amendment Act, 1865 (28 & 29 Vict. c. 86): *Ex parte Taylor, In re Grason.* (1) And so under s. 59 of the Bankruptcy Act, 1883, where one partner is adjudged bankrupt, a creditor to whom the bankrupt is indebted

(1) (1879) 12 Ch. D. 366.

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jointly with the other partner cannot receive any dividend out of the separate property of the bankrupt until all the separate creditors have been paid in full. "Recover" in s. 3 of the Partnership Act, 1890, means "take proceedings to recover."

[LORD ALVERSTONE C.J. I think it means "recover effectively."]

Here the lender is attempting by his petition to recover his loan in respect of which he is by that section postponed to the other creditors; but before he can come in as a petitioning creditor at all he must prove his debt as required by s. 7, sub-s. 2, of the Bankruptcy Act, 1883—that is, he must shew that there is something coming to him after the other creditors are satisfied. But it is clear that in this case there is hopeless insolvency, and it is contrary to the practice of the Court to make a receiving order which can lead to no substantial result: *In re Betts.* (1)

McCall, Q.C., and *F. Cooper Willis*, for Talbot. Upon the first point, Miller's oral statement was a sufficient notice of his inability to pay his debts. Again, Talbot became Miller's creditor by reason of his default on the Stock Exchange and of his telling Talbot that the business had come to an end. The moment the business came to an end the 2000*l.* became recoverable, for it was then impossible to carry out the agreement at all; and an action to recover the money could be maintained on the ground that the consideration for which it had been paid had failed: *Knowles* v. *Bovill.* (2) And further, it is submitted, as to the effect of s. 3 of the Partnership Act, 1890, that the mere fact that the lending partner cannot recover anything from the bankrupt borrowing partner until the other creditors have been satisfied does not prevent the lender from presenting a bankruptcy petition. There is nothing in that section, or in any other part of that Act or of the Bankruptcy Act, to the effect that a partner who is a deferred creditor is not entitled to present a petition unless he can shew that he will get 20*s.* in the pound after the other creditors are satisfied.

Herbert Reed, Q.C., in reply.

Cur. adv. vult.

(1) [1897] 1 Q. B. 50. (2) (1870) 22 L. T. (N.S.) 70.

1900. Nov. 2. LORD ALVERSTONE C.J. The question raised on this appeal is whether there was a good petitioning creditor's debt on which to found a petition in bankruptcy. The material facts are as follows: [His Lordship stated them as above, and continued:—]

I am of opinion that if Talbot was a creditor on July 3 for the sum of 2000*l.*, either then payable or payable at a certain future time, there was a good notice by the bankrupt under sub-s. 1 (*h*) of s. 4 of the Bankruptcy Act, 1883; but in my opinion there was not upon July 3 any liquidated sum due to Talbot either then or at a certain future time. It was not contended before us that any event had happened which justified Talbot in giving a notice under clause 6 of the original agreement, but it was urged that the whole agreement was subject to the condition that Miller should be in a position to carry on the business, and that what had occurred upon June 28 rendered it impossible for him to fulfil the agreement, and that thereupon the 2000*l.* became immediately repayable. I cannot take this view. It seems to me that as things stood on July 3 Talbot's only remedy was in damages for breach of the agreement. If, for instance, the 2000*l.* was lost in the business by its being used for hazardous or speculative purposes, or from some other cause not contemplated by clause 6, Talbot's right course was to sue Miller for damages; and I cannot see that, either under the agreement or on general principles, the fact that Miller was "hammered"—it is said without any improper conduct on his own part—gave Talbot a right to demand immediate repayment of the 2000*l.* I am further of opinion that there was no liquidated debt of 2000*l.* payable at any certain future time. The question whether that amount ever became payable would depend upon whether Talbot exercised his rights of terminating the partnership under the agreement. I do not think that this contingency can properly create a debt for a liquidated sum payable at a certain future time. The appeal will be allowed with costs.

RIGBY L.J. I am of the same opinion, but I wish to found my judgment exclusively on the state of things on July 3. At

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that date I think that Talbot was not a creditor, and, therefore, the statement alleged to have been made by Miller could not be a sufficient act of bankruptcy.

VAUGHAN WILLIAMS L.J. I entirely agree. There can be no doubt but that on July 3, as on July 2, the state of things was such that it was impossible for Talbot to sue for money lent under the contract; and the only question, therefore, is whether Talbot was in a position to sue for money had and received on the basis of the contract being avoided by the "hammering" of Miller. Now, there can be no doubt but that a contract may, without an express provision to that effect, be made conditional upon the continued possibility of performance. A contract, although absolute in its terms and containing no express mention of particular events which may render the performance impossible, may yet sufficiently denote an intention of the parties that the contract shall apply only to a particular state of things or to a particular venture contemplated by the parties, and that the contract shall not apply in events which render the fulfilment of the contract as intended, or the entering upon the contemplated venture, impossible. No doubt, in such an agreement a condition is implied that the contract may be avoided under the circumstances to which it is manifestly intended not to apply. In such a case an action for money had and received would lie; but, in my judgment, in the present case there is nothing in the contract which would make it right to imply such a term. The utmost that can be implied is a term for the protection of Talbot, which he could, if he chose, waive.

Under these circumstances I entirely agree that at the crucial moment Talbot's only right, if any, was to bring an action for damages.

Appeal allowed.

Solicitors: *Michael Abrahams, Sons & Co.; H. A. Graham.*

G. I. F. C.

PHILLIPS *v.* ALHAMBRA PALACE COMPANY.

1900
Nov. 13.

Partnership—Contract with—Death of Partner—When Contract terminated by.

A partnership, consisting of the defendants and another person, carried on the business of music-hall proprietors under the name of the A. Company. The plaintiffs, a troupe of music-hall performers, entered into a contract with the A. Company to give certain performances at the company's music hall. The plaintiffs had no knowledge of the persons of whom the company consisted. After the making of the contract and before the time for performance arrived the defendants' partner died:—

Held, that the contract was not of such a personal character on the part of the partnership as to be put an end to by the death of the deceased partner, and that it could be enforced against the defendants, the surviving partners.

Appeal from county court of Hull.

The plaintiffs were a troupe of four music-hall performers, and in October, 1897, they entered into a contract with certain music-hall proprietors calling themselves the Alhambra Palace Company to appear and perform at the Alhambra Palace, Hull, for a period of twelve nights commencing August 8, 1898, at a weekly salary of 28*l.*, and also for a further period of twelve nights commencing October 23, 1899, at a similar salary. It was provided by the contract that "in the event of any unforeseen calamity by which the business may be suspended or stopped all engagements will terminate immediately." In the contract the proprietors of the music hall were described simply as the Alhambra Palace Company, and it was signed on their behalf by T. H. Greasley, who was described as the managing director. The Alhambra Palace Company was in fact a partnership, which at the time of the making of the said contract consisted of three partners, T. H. Greasley, H. Willford, and P. Robson, but it was admitted that the plaintiffs had at that time no knowledge of the composition or nature of the company with which they were contracting. The property of the company was at that time heavily mortgaged. On December 16, 1897, Willford died, and the business was

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carried on by the surviving partners, but no notice was given to the plaintiffs of the death. In August, 1898, the plaintiffs carried out the first part of their engagement and were paid for their services. On July 4, 1899, the mortgagees sold the music hall under their power of sale. The plaintiffs had meanwhile been on tour fulfilling engagements abroad, and returned to this country in September, 1899, in readiness to perform the second part of their engagement in October. On arriving at Plymouth they received a notice to the effect that in consequence of the death of one of the proprietors and consequent dissolution of partnership the Alhambra Palace had been sold and closed, and all contracts were void. The plaintiffs declined to accept the notice cancelling their engagement, and claimed their right to carry it out. They presented themselves at the music hall at the time fixed by the contract, but were not allowed to perform. They then commenced this action in the High Court against the surviving partners and the executors of Willford to recover the sum of 56*l.*, being the amount of the salary which they would have been entitled to if the contract had been carried out. The action was remitted for trial to the county court. The defendants resisted the claim on the grounds—(1.) that, the contract being one for personal service, was cancelled by the death of one partner, and (2.) that the sale by the mortgagees was an "unforeseen calamity." The county court judge overruled both objections, and gave judgment for the plaintiffs as against the surviving partners Greasley and Robson, but dismissed the executors of Willford from the action.

The defendants appealed.

Cautley, for the defendants. This was a contract for personal service, and therefore was determined by the death of one of the partners. In *Tasker* v. *Shepherd* (1), where a firm consisting of two partners entered into a contract to employ the plaintiff as their sole agent for a certain term, and subsequently one of the partners died, it was held that the surviving

(1) (1861) 6 H. & N. 575.

partner was under no obligation to continue to employ the plaintiff during the residue of the term. In *Brace* v. *Calder* (1), where the plaintiff was engaged by a partnership as the manager of their business, Lord Esher was of opinion that a voluntary dissolution of partnership would have the same effect as death in putting an end to the contract. Lopes and Rigby L.JJ. dissented from that proposition; but they seem to have conceded that the contract would have been terminated by the death of one of the partners. There is no difference in principle between a contract of personal service and one involving personal skill. If in the present case one of the plaintiffs had died, the other members of the troupe would have been discharged from their engagement. But rights must be mutual, and consequently the death of one of the employers must equally terminate the engagement. In *Robson* v. *Drummond* (2), where one of a firm of coachbuilders entered into a contract with the defendant to furnish him with a carriage for a term of years, and before the expiry of the term the firm dissolved partnership, it was held that the contract was thereby put an end to, and could not be enforced for the benefit of the surviving partner who continued to carry on the business. Secondly, the sale of the music hall by the mortgagees was an unforeseen calamity, by which the business was stopped within the meaning of the contract.

Trevor White, for the plaintiffs. The contract was not a personal one. It could not be so, for the plaintiffs did not know who the persons were of whom the company consisted. But even if they had known, there was nothing to establish a personal relation between the parties. It was perfectly immaterial to the plaintiffs whether the constitution of the firm remained the same as it was at the date of the contract or not. It is pointed out in Lindley on Partnership, 6th ed. p. 297, that a contract with a firm is dissolved by a change in the firm only in the event of the contract being of such a personal character that it must be performed by the individuals who have entered into it and by no one else. That was the

(1) [1895] 2 Q. B. 253. (2) (1831) 2 B. & Ad. 303; 36 R. R. 569.

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explanation of *Robson* v. *Drummond*. (1) But here all the defendants had to do was to pay money, and that could be done equally well by any one else.

Cautley, in reply.

LORD ALVERSTONE C.J. This is a case which in my opinion is not altogether free from difficulty. In the first place we must ascertain the facts of the case, and then consider what is the principle of law applicable to those facts. It appears that the plaintiffs, who are a troupe of four music-hall artists, in the year 1897 entered into a contract with the Alhambra Palace Company of Hull to give two series of performances at the Alhambra Palace, one in August, 1898, and the other in October, 1899. It was not known to the plaintiffs that the contracting parties, who were described in the contract as a company, the person who signed the contract on their behalf being described as the managing director, were in fact a partnership consisting of three persons. In December, 1897, Willford, one of the partners, died. In August, 1898, the plaintiffs, without notice of that fact, performed at the Alhambra Palace in accordance with their contract, and were paid by the surviving partners, the present defendants. In July, 1899, the mortgagees of the Alhambra Palace sold it under their power of sale, and from that time the defendants ceased to have anything to do with it. The question is whether they are liable under their contract for not employing the plaintiffs in October, 1899. It was contended on their behalf that the contract was put an end to first by the death of one partner, and secondly by the sale by the mortgagees. With regard to the second point, I do not think that interference by the mortgagees in the exercise of their power of sale can be regarded as an unforeseen calamity of the kind contemplated by the provision in the contract. As to the other point, whether the death of one partner puts an end to the contract, there is more difficulty. The principle of law, however, seems to be that it must be determined in each case whether the obligation which

(1) 2 B. & Ad. 303; 36 R. R. 569.

it is sought to enforce depended upon the personal conduct of the deceased party. This seems to be clearly brought out by the two cases which were cited in the course of argument: *Tasker* v. *Shepherd* (1) and *Robson* v. *Drummond*. (2) In the former the action was brought against the survivor of two partners upon a contract whereby the defendant and the deceased partner engaged the plaintiff as their agent for a period of four and a half years, and the breach alleged was that the defendant would not employ him during the whole of that period. The Court drew the inference that the parties contracted with reference to the existing partnership business only. It was pointed out that the business which was carried on after the death of one partner might be a wholly different one, and much less lucrative to the plaintiff. In *Robson* v. *Drummond* (2) the defendant entered into a contract with a coachbuilder named Sharpe for the hire of a chariot for the term of five years at a yearly payment which was to be paid each year in advance. At the time of making the contract the plaintiff Robson was a secret partner of Sharpe, but the defendant was not aware of that fact. After the defendant had had the chariot for three years, he received notice from Robson that the partnership had been dissolved and the business was being carried on by Robson alone. The defendant refused to continue the hiring from Robson and returned the chariot. An action having been brought to recover the last two yearly payments, a nonsuit was upheld. Lord Tenterden observed: "The defendant may have been induced to enter into this contract by reason of the personal confidence which he reposed in Sharpe, and therefore have agreed to pay the money in advance. The latter, therefore, having said it was impossible for him to perform the contract, the defendant had a right to object to its being performed by any other person, and to say that he contracted with Sharpe alone, and not with any other person." There the basis of the contract was the personal conduct of the contracting party. If in any particular case the contract is one which has relation to the personal conduct of the contracting party, then the death of that party puts an end to the

(1) 6 H. & N. 575. (2) 2 B. & Ad. 303; 36 R. R. 569.

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Lord Alverstone C.J.

contract; if, on the other hand, it has no such relation, the death of the contracting party has not that effect. In the present case I have come to the conclusion that the plaintiffs did not rely on the personnel of the partners, who were unknown to them. And under those circumstances I am of opinion that the liability contracted by the three partners can after the death of one of them be enforced against the two survivors. The appeal must be dismissed.

KENNEDY J. I agree that the case is one of some difficulty. I think, on the authority of the decisions and also of the text-books, the true question in each case must be, What did the contracting parties intend to do by their contract? Each contract must be considered with reference to its terms, to the relation between the parties, and the nature of the engagement. It may be that the contract is so dependent on the continued existence of the partnership business, as in *Tasker* v. *Shepherd* (1), or on the personal honesty or capacity of the particular partner, as in *Robson* v. *Drummond* (2), that the death of one partner will put an end to the contract altogether. In Lindley on Partnership, 6th ed. p. 297, it is said: "If a person enters into a contract with a firm, and that contract is of a purely personal character, to be performed by the individuals who have entered into it, and not by any one else, a change in the firm may operate as a dissolution of the contract, so that neither the new nor the old partners can sue in respect of any alleged breach which may have occurred since the change took place." In Bullen and Leake, 3rd ed., at p. 229, the law is thus stated: "A contract made with a partnership respecting matters connected with the partnership business is generally construed as applicable to the existing partnership and business, and is terminated by a dissolution or change of the partnership or alteration in its business, unless the contrary intention expressly appears." It is clear that no absolute rule can be laid down which shall be applicable to all cases. The case of *Tasker* v. *Shepherd* (1) has certainly gone as far as any case. But even there the judges did not go upon the ground that the

(1) 6 H. & N. 575. (2) 2 B. & Ad. 303; 36 R. R. 569.

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Kennedy J.

case fell within the principle of those cases in which the contract has been held to be put an end to by reason of the personal skill of the parties being involved. They only said that it might be so. They expressed no opinion upon it. The real ground of the decision was that the contract had reference to the existing partnership business only. So I can conceive that a contract such as we have to deal with in the present case might be made under circumstances under which it would be unjust to compel the plaintiffs to perform for the surviving partners, and under which it would be equally unjust to compel the surviving partners to employ them. But here, if the plaintiffs are provided with the agreed stage on which to perform, and are only required to perform at the agreed time and under the agreed conditions, it surely cannot matter to them who the particular persons are by whom they are to be paid. The case does not fall within the decision of *Tasker* v. *Shepherd*. (1)

Appeal dismissed.

Solicitor for plaintiffs: *J. M. Rutter, Bolton.*

Solicitors for defendants: *Collyer-Bristow, Russell & Co., for J. J. Underwood, Hull.*

(1) 6 H. & N. 575.

J. F. C.

1900
Nov. 17.

THE QUEEN *v.* SOWTER.

Ecclesiastical Law—Churchwarden—Admission of by Archdeacon—Power of Bishop to Inhibit—Ministerial Act.

The admission by an archdeacon of persons elected to the office of churchwarden being a ministerial act, the bishop has no power to inhibit the archdeacon from performing it.

Rex v. *Simpson*, (1725) 1 Str. 609, followed.

MANDAMUS to the Archdeacon of Dorset to admit a churchwarden.

At the election of churchwardens for the parish of Winterborne Came in the archdeaconry of Dorset, held on April 23, 1900, there were two candidates for the office of parishioners' churchwarden—Samuel Vine, the prosecutor, and John Stevens Passmore—and a poll was demanded. The poll was held on May 7, when it appeared that the candidates received an equal number of votes. The rector of the parish, who presided as chairman at the poll, gave a casting vote in favour of the prosecutor and declared him to be duly elected. The year 1900 being the year of the triennial visitation of the Bishop of Salisbury, the Archdeacon of Dorset, the Rev. T. B. Sowter, was on May 29 served with the bishop's inhibition dated May 28, whereby he was inhibited for the space of three months from the date thereof from exercising in his archdeaconry "any spiritual or ecclesiastical jurisdiction concerning the visitation of the clergy, the admission of the churchwardens, the receiving of presentments, and the doing of any other act, matter, or thing appertaining to the visitation of a bishop" unless the inhibition should be sooner relaxed. On July 13, while the inhibition was still in force, the prosecutor applied to the archdeacon to admit him to the office of churchwarden. The archdeacon replied that he was not in a position to do so. The prosecutor obtained a rule nisi for a mandamus to the archdeacon to admit him.

Dibdin, for the archdeacon, shewed cause. The mandamus is sought against the wrong person. It should have been

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against the bishop, for he alone, whilst his inhibition remained unrelaxed, had jurisdiction to admit churchwardens within the archdeaconry. Churchwardens are required to present themselves to be sworn into their office at the next visitation after their election, which shall be held either by the bishop, archdeacon, or other ordinary: Cripps' Law of Church and Clergy, 6th ed. p. 181. If the next visitation is that of the bishop, it is to the bishop that the churchwarden must present himself. The bishop's and archdeacon's jurisdictions are not concurrent. The one supersedes the other. In the bishop's triennial visitation all inferior jurisdictions are inhibited from exercising jurisdiction during such visitation: Phillimore's Ecclesiastical Law, 2nd ed. p. 1050. The bishop's power to inhibit applies to all acts done by the inferior officer, including ministerial acts. Indeed, the principal part of the archdeacon's visitation consists in the admission of churchwardens. The form of inhibition in the present case is that commonly in use. During the bishop's visitation it is the settled practice for the fees in respect of ministerial acts, such as the admission of churchwardens or the issuing of marriage licences, to be paid to the bishop's officials, not to the archdeacon's. It is true that in *Rex* v. *Simpson* (1) it was held that to a mandamus to the Archdeacon of Colchester to admit a churchwarden a return that before the coming of the writ he had received an inhibition from the Bishop of London, with a signification that he had taken upon himself to act in the premises, was held bad on the grounds, first, that the Court could not take judicial notice that the town of Colchester was in the diocese of London; and, secondly, that the archdeacon, being but a ministerial officer, is obliged to do the act whether it be of any validity or not. But in the more authoritative report of the case in Lord Raymond's Reports, no mention is made of the second ground. In *Reg.* v. *Thorogood* (2) it is laid down by Lord Denman, delivering the judgment of the full Court of Queen's Bench, that the bishop's inhibition "suspends all the powers and authorities of the officer affected by it." Indeed, even

(1) 1 Str. 609; 2 Ld. Raym. 1379; 8 Mod. 325.

(2) (1840) 12 A. & E. 183, at p. 197.

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after the bishop's visitation is over the matters which were brought to the bishop's notice during that period remain for him to deal with, and do not pass to the archdeacon.

Edwardes Jones, in support of the rule. The bishop has no right to inhibit against the admission of churchwardens. It is not a spiritual matter. There is no authority to shew that the archdeacon's jurisdiction in the matter of the admission of churchwardens is an inferior jurisdiction. The report of *Rex* v. *Simpson* (1) in Strange has been treated in all the text-books as correct, and the case has always been regarded as an authority for the proposition that during the bishop's visitation the archdeacon has concurrent jurisdiction with the bishop in the admission of churchwardens. The reference to the case in Burns' Ecclesiastical Law, vol. i. p. 406, is a verbatim copy of the report in Strange. See, too, Phillimore's Ecclesiastical Law, 2nd ed. p. 1480. The case is also reported in 8 Mod. 325, and in that report not only is the Court represented to have proceeded on the ground that the bishop had no power to inhibit, but that is represented as being the only ground on which the mandamus was granted: "A peremptory mandamus was granted . . . . for the Court said that where the churchwardens are to be elected by the parishioners by prescription, it shall not be in the power of the parson (i.e., the bishop) to hinder them."

LORD ALVERSTONE C.J. I think that this rule should be made absolute. In my opinion, apart from the authority of *Rex* v. *Simpson* (1), a churchwarden has long been regarded for all substantial purposes as a temporal officer, and I confess I should hesitate before I expressed the opinion that any ecclesiastical authority as such could prevent his admission. It seems to have been hardly disputed that the admission of a churchwarden is a ministerial act, and that an archdeacon has no right to inquire into the validity of the election when the elected person presents himself before him for admission. But the case of *Rex* v. *Simpson* (1), as reported in Strange, is a direct authority upon the point. Mr. Dibdin has pointed out that in the report of that case in Lord Raymond no mention is made of the writ

(1) 1 Str. 609.

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of mandamus having been granted on any other ground than that the Court could not take judicial notice of the defendant's archdeaconry being within the inhibiting bishop's diocese. But I think it is quite impossible to adopt the view that there is a mistake in Strange's Report. It has undoubtedly been treated as an authority for the point in many text-books; and as we are dealing with a temporal office it seems to me good sense that the mere prohibition by a spiritual authority in such a matter ought not to prevent the person whose duty it is to admit the elected person to the office from admitting him. During the course of the argument I referred to the case of *Rex* v. *Harris* (1), where, to a writ of mandamus to the commissary of the episcopal court to admit certain churchwardens, it was held a bad return that there was litigation then pending before the defendant as to whether the persons claiming the office of churchwarden were duly elected. But it seems to me that that would have been quite as good a ground for the Court refusing to grant the mandamus as that there had been an inhibition by the bishop to the archdeacon. I think that reason is in favour of the view, for which the report in Strange is an authority, that the bishop has no right to inhibit the archdeacon from the purely ministerial act of admitting a churchwarden. That authority is binding on us, and this rule must be made absolute.

KENNEDY J. I agree. No authority has been produced to us which would lead me to differ from the very reasonable grounds upon which the decision of the Court proceeded in *Rex* v. *Simpson* (2), as reported in Strange. From what is stated in Phillimore's Ecclesiastical Law, 2nd ed. p. 1471, it seems to be doubtful whether the Ecclesiastical Court has jurisdiction to try the validity of the election of churchwardens; but the weight of authority is clearly in favour of the view that the admission of a churchwarden is a ministerial act—in other words, that the validity of his election cannot be so tried, but must, if questioned, be tried in a court of law. And if the

(1) (1763) 3 Burr. 1420. (2) 1 Str. 609.

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admission is a ministerial act, the bishop has no power to inhibit the archdeacon from performing it.

Rule absolute.

Solicitors for prosecutor: *Jenkins, Baker & Co.*
Solicitors for archdeacon: *Robins, Hay, Waters & Hay.*

J. F. C.

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Nov. 16, 21.

SAUNDERS *v.* WHITE.

Bill of Sale—Validity—Form in Schedule—Bill of Sale given by two Grantors—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9, *Sched.*

A bill of sale given by two or more grantors, who are not jointly interested in any of the goods comprised therein, but each of whom is the sole owner of a portion of the goods, is void, as not being in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882.

APPEAL from the decision of the judge of the county court of Surrey sitting at Wandsworth in an interpleader issue.

The respondent having recovered judgment in an action against J. W. White, certain goods were seized in execution to which a claim was made by the appellant. The claimant was the grantee under a bill of sale made by J. W. White and Emily, his wife, by which, in consideration of 80*l.* then paid to them, they assigned to the claimant the chattels described in the schedule annexed thereto by way of security for the payment of 80*l.* and interest. By the instrument the grantors "and each of them" covenanted to pay the principal and interest by instalments on specified dates, to insure the chattels against fire in the joint names of the grantors and grantee, and to produce on demand the policy of insurance and the receipt for the current year's premium, to punctually pay all rent, rates, taxes, &c., in respect of the premises on which the chattels might be, and to produce on demand in writing the last receipts for the same. Power was reserved to the grantee to enter the premises and take inventories, and there was the

statutory proviso that the assured chattels should not be liable to seizure or to be taken possession of by the grantee for any cause other than those specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882.

At the trial of the interpleader, it appeared that the husband and wife, the grantors of the bill of sale, had no joint interest in any of the goods comprised in the security, but that part of the goods were the sole property of the husband, while the remainder belonged solely to the wife. It further appeared that when the bill of sale was executed the 80*l.* was handed to the grantors by the clerk who was acting on behalf of the claimant; that after it was so handed to them the clerk said to them, "You ought to pay our costs"; and that the grantors assented to this suggestion and handed him 13*l.* 11*s.* 6*d.* for the costs. The learned county court judge held that the bill of sale was void on the grounds that it was not in accordance with the form in the schedule to the Bills of Sale Act, 1882, that the grantors were not the true owners of the goods, and that the consideration was not truly stated. The claimant appealed.

Mattinson, Q.C. (*Firminger* with him), for the claimant. The bill of sale is in substantial conformity with the form in the schedule to the Bills of Sale Act, 1882. There is nothing to prevent a bill of sale being given by two grantors of goods in which they have no joint interest, but of a portion of which each of the grantors is the absolute owner. In *Ex parte Popplewell, In re Storey* (1), a bill of sale given by a father and son, who were described as carrying on business in partnership and as the "mortgagor," was held to be good, although the son had in fact no interest in any of the goods comprised in the security; and Jessel M.R. expressed a clear opinion that, if both of the grantors had been separately named, the whole of the property belonging to them or either of them would pass by the assignment. The case of *Melville* v. *Stringer* (2), where a bill of sale made between the grantor and four sets of grantees to secure different debts owing to each of them respectively

(1) (1882) 21 Ch. D. 73. (2) (1884) 13 Q. B. D. 392.

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was held to be bad, is not in point; there the bill of sale was obviously so complicated as to be substantially at variance with the statutory form. Secondly, the consideration was truly stated; the whole of the money was paid over to the grantors without any antecedent agreement as to payment of the grantee's costs; the case does not therefore come within the principle of *Richardson* v. *Harris* (1), where the consideration was held not to be truly stated, as part only of the money had been paid over to the grantor and the remainder had been retained by the grantee. [He also cited *In re Tamplin, Ex parte Barnett.* (2)]

J. R. Atkin (*Duke, Q.C.*, with him), for the execution creditor. The county court judge was right. A bill of sale must have the precise legal effect as the form in the schedule: *Ex parte Stanford, In re Barber* (3); *Thomas* v. *Kelly.* (4) The statute uses throughout the expression "grantor" in the singular, and it is doubtful whether it even authorizes the giving of a bill of sale by partners—a point which was considered, but not decided, in *Melville* v. *Stringer* (5); it does not authorize a bill of sale by two persons who have no joint interest in any of the goods comprised in the security. If this is a good bill of sale, it will be necessary throughout s. 7 of the Act of 1882 to read the expression "the grantor or grantors or either of them" in place of "the grantor," and under sub-s. 2. the goods of one of the grantors would be liable to seizure by the grantee upon the bankruptcy of the other grantor. Moreover, a borrower would not understand his position under such an instrument; for instance, he would not understand that if the goods of the other grantor were fraudulently removed, his own goods would be liable to seizure. Such a bill of sale would evade the provisions of s. 12 avoiding a bill of sale given for less than 30*l.*, for several persons could club together and by means of one bill of sale each would be enabled to obtain an advance for a small amount. The consideration was not truly stated; the arrangement by which costs were

(1) (1889) 22 Q. B. D. 268.
(2) (1890) 62 L. T. 264.
(3) (1886) 17 Q. B. D. 259.
(4) (1888) 13 App. Cas. 506.
(5) 13 Q. B. D. 392.

deducted from the amount of the loan was really part of the bargain.

Mattinson, Q.C., in reply. It is not an objection to a bill of sale given by two grantors that the statutory form uses the word "grantor" only; the singular includes the plural. If the test is whether the borrower or a creditor would be deceived, it is satisfied in the present case, for the meaning of the instrument is abundantly clear. Both Lord Esher M.R. in *Melville* v. *Stringer* (1), and Jessel M.R. in *Ex parte Popplewell, In re Storey* (2), which was decided under the Act of 1878, expressed a clear opinion that two persons could join in giving a bill of sale.

Cur. adv. vult.

Nov. 21. The written judgment of the Court (Lord Alverstone C.J. and Kennedy J.) was delivered by

LORD ALVERSTONE C.J. This is an appeal from the judge of the Wandsworth County Court, who has decided in favour of the judgment creditor and against the claimant under a bill of sale. The bill of sale in question was dated May 3, 1900, and was made by Joseph William White, builder, and Emily, his wife, as grantors, and Samuel Thomas Biggs, a solicitor, as grantee, in consideration of the sum of 80*l.* lent by Biggs to the two grantors. The security given was an assignment of furniture, some of which on the evidence is stated to have belonged to the husband and some to the wife. The bill of sale contained covenants by the husband and wife and each of them, among other things, that they would punctually pay the principal, together with interest, by four equal monthly payments of 20*l.* each, and contained certain other agreements which are not material. Lastly, it contained a proviso in accordance with the form of the Act of 1882 that the chattels should not be liable to seizure for any cause other than those specified by s. 7. The learned county court judge decided in favour of the execution creditor and against the claimant upon three grounds: first, that the bill of sale was not in accordance with the form annexed to the statute; secondly, that the

(1) 13 Q. B. D. 392. (2) 21 Ch. D. 73.

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grantors were not the true owners; and, thirdly, that the consideration was not truly stated.

It will be convenient to dispose of the last point first, as we are of opinion that in this respect the learned judge was wrong. The evidence was that, 80*l.* having been paid by the clerk of the grantee to White and his wife, the solicitor's clerk, after the transfer was complete, said to the claimants, "You ought to pay our costs"; and thereupon the sum of 13*l.* 11*s.* 6*d.* costs was paid by the grantors. If that payment was not made in pursuance of some antecedent agreement, it would not invalidate the bill of sale. We are clearly of opinion on the evidence before us that there was no antecedent agreement, and that if that had been the only objection the bill of sale must be held to be valid.

The question, however, which has been raised by the first two points is one of very great general importance—whether two persons who are not in partnership, and who are not jointly possessed of the goods but each possess a part of them, can join in giving a bill of sale in respect of the goods, and whether the bill of sale so given is valid, having regard to the provisions of the statute. We are of opinion that the decision of the learned county court judge is right, and that this bill of sale cannot be supported.

It has been clearly decided that the bill of sale must be in substance or substantially in the form of the schedule, by which we understand that no departure is allowed from the form in the schedule which is not merely verbal or immaterial, or which substantially affects the rights and obligations purported to be given to and imposed upon the respective parties: see, among other cases, *Ex parte Stanford, In re Barber* (1); *Thomas* v. *Kelly*. (2) The question is whether a bill of sale given in form by two grantors who are not jointly interested in the goods, but are each owner of part of them, does depart in substance from the form given in the schedule. We are of opinion that the learned county court judge was right in deciding that it does. The Bills of Sale Act, 1882, uses throughout the word "grantor" in the singular, and there is

(1) 17 Q. B. D. 259. (2) 13 App. Cas. 506.

no definition of the word "grantor." According to the Interpretation Act, 1889, the singular would include the plural unless the contrary intention appears. In this case, however, we are of opinion that it is not possible to hold that the Legislature contemplated the bill of sale being given jointly by two independent persons. Among other grounds it is necessary to consider the application of s. 7 of the Bills of Sale Act, 1882. The form of the bill of sale given in the schedule provides that the chattels shall not be liable to seizure in any case other than those specified in s. 7 of the Act of 1882. This proviso is of the substance of the matter. When we turn to the provisions of s. 7 it is difficult, if not impossible, to see how they could be practically carried into effect in the case of two grantors independently interested. It would be necessary to read the word "grantor" in sub-ss. 1 to 5 sometimes as referring to one grantor and sometimes as including both grantors, and sub-s. 2, which gives as one of the causes for taking possession "if the grantor shall become a bankrupt," would be in many cases wholly incapable of application; the contention that any such difficulty might be met by the proviso does not seem to us any answer to the substantial objection which would be raised. Further, as was pointed out in the course of the argument, any other view might give rise to serious difficulties under s. 12. That section prohibits the granting of a bill of sale for less than 30*l*. If a bill of sale given by two persons in the position of the claimants is good, several persons, each possessed of goods, might join together to obtain a loan of small sums amounting in the aggregate to over 30*l*. It was suggested in argument that the opinion of Lord Esher M.R. in *Melville* v. *Stringer* (1) conflicted with this view, and no doubt the language there used does support the view that persons might agree to join together to borrow or lend a sum of money. But the point was not necessary for the decision of that case, and no opinion to the same effect was expressed either by Bowen L.J. or Fry L.J.

We are not, of course, expressing any opinion as to what might be the effect of a bill of sale given by partners, but for

(1) 13 Q. B. D. at p. 399.

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the reasons we have given we are of opinion that the bill of sale given in this case was invalid, and the decision of the county court judge should be affirmed.

Appeal dismissed.

Solicitors for claimant: *Biggs-Roche, Sawyer & Co.*
Solicitors for execution creditor: *Willett & Sandford.*

W. J. B.

C. A.

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Nov. 27.

[IN THE COURT OF APPEAL.]

SOLOMON *v.* MULLINER AND THE MOTOR CARRIAGE SUPPLY COMPANY, LIMITED.

Practice—Costs—Sum less than 10*l. recovered in Action founded on Tort—Action "which could have been commenced in a County Court"—County Courts Act,* 1888 (51 *&* 52 *Vict. c.* 43), *s.* 116.

An action is one which "could have been commenced in a county court" within the meaning of the County Courts Act, 1888, s. 116, if it is an action of a kind which a county court can entertain, although the amount claimed by the plaintiff may exceed the limit of the county court jurisdiction.

Goldhill v. *Clarke,* (1893) 68 L. T. 414, disapproved of.

Lovejoy v. *Cole,* [1894] 2 Q. B. 861, followed.

APPEAL against an order made by Day J. at chambers as after mentioned.

The action was brought by the plaintiff against the defendants, one Mulliner and the Motor Carriage Supply Company, Limited, claiming the return of a motor car, and damages for its detention, and as against the last-mentioned defendants an injunction to restrain them from parting with it.

The statement of claim stated that the plaintiff had in January, 1900, purchased an automobile car from the manufacturers of it, and in February, 1900, deposited the same with the defendant Mulliner for safe custody; that in or about the month of May, 1900, the defendant Mulliner refused to deliver up the said car, and wrongfully, and without the authority of the plaintiff, parted with the same to the defendants, the Motor

Carriage Supply Company, Limited; that the last-mentioned defendants illegally retained possession of the said car, and refused to deliver it up to the plaintiff or to account to him for the price thereof; and the plaintiff claimed against the defendants jointly and severally—(1.) The return of the said car, or, alternatively, the sum of 500*l.*, the price and value of the same. (2.) Damages for improperly and unlawfully refusing to give up the said car, and depriving the plaintiff of the possession and use thereof.

The defendant Mulliner by his defence pleaded statements amounting to a denial of liability, and, alternatively, brought into court the sum of 40*s.*, alleging it to be sufficient to satisfy the plaintiff's claim against him.

The defendants, the Motor Carriage Supply Company, Limited, stated in their defence, in substance, as follows: That one Heyermans agreed to purchase the car in question from the manufacturers thereof for the price of 398*l.*, and that on or about August 8, 1899, they, the said defendants, advanced to him, upon the security of the car, and for the purpose of paying the first instalment of the price thereof, a sum of 120*l.*, wherewith he duly paid that instalment; that in January, 1900, Heyermans completed the purchase of the car, and paid to the manufacturers the balance of the price, borrowing the sum of 278*l.* for that purpose from the plaintiff, who then knew of the advance of 120*l.* by the said defendants to Heyermans on the security of the car and the purpose for which it was made; that the plaintiff did not purchase, nor did Heyermans sell to the plaintiff the said car, nor did the plaintiff obtain any property therein, or charge thereon; that, by an agreement in writing dated May 16, 1900, between the defendants, the Motor Carriage Supply Company of the first part, Heyermans of the second part, and the Automobile Manufacturing Company, Limited, of the third part, the parties of the first and second parts, so far as related to their respective interests in the same, agreed to sell the car to the party of the third part for the price of 440*l.*, of which 100*l.* was to be paid to the defendants, the Motor Carriage Supply Company, and 340*l.* to Heyermans; that the defendant Mulliner, at the request of

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Heyermans, and with the consent of the defendants, the Motor Carriage Supply Company, on May 16 delivered the car in pursuance of the agreement to the Automobile Manufacturing Company, who paid for the same by two cheques payable to the defendants, the Motor Carriage Supply Company, or their order; that on June 8, 1900, after the commencement of the action and before the cheques had been paid, upon an application by the plaintiff at chambers for an interim injunction to restrain the defendants from dealing with the car, the defendants, the Motor Carriage Supply Company, offered to bring the proceeds when received of the cheques into court to abide the order of the Court, and thereupon Darling J. ordered that the cheques should be cashed, and the amount paid into court to abide further order; that, on June 28, 1900, the defendants, the Motor Carriage Supply Company, brought the sums of 340*l.* and 100*l.* into court in accordance with the order; that, if the car was the property of the plaintiff, the plaintiff had authorized Heyermans, or held him out as having authority, to effect the sale of it; that the said defendants did not refuse to deliver up the car to the plaintiff, and, save as aforesaid, they denied the allegations of the statement of claim; and that the said defendants claimed to retain the said sum of 100*l.* in respect of their said advance, and as assignees of Heyermans under the agreement of May 16, 1900, but that they did not claim the said sum of 340*l.* or any part thereof, and were willing, so far as they lawfully could, to consent to an order for the payment out of court thereof to the plaintiff.

On July 25, 1900, an order was made, with the consent of Heyermans, that the sum of 340*l.* should be paid out to the plaintiff, and the action proceeded against the defendants, the Motor Carriage Supply Company, in respect of the remaining 100*l.*

On August 4, 1900, the plaintiff gave notice that he accepted the sum of 2*l.* paid in by the defendant Mulliner in satisfaction of the claim in respect of which it was paid into court. The plaintiff then applied to the master to tax his costs against the defendant Mulliner, but the master held that he was not entitled to any costs by reason of the provisions of s. 116 of

the County Courts Act, 1888. The plaintiff thereupon applied to Day J. at chambers, by way of appeal, for an order for taxation of his costs on the High Court scale on the ground that the action could not have been brought in the county court, and, alternatively, for a certificate that the action was fit to have been brought in the High Court. The learned judge refused the application.

Wheeler, Q.C., and *J. Todd*, for the plaintiff. First, the plaintiff is entitled to his costs as against the defendant, Mulliner, without any certificate. Secondly, the learned judge ought under the circumstances to have granted a certificate under s. 116 of the County Courts Act, 1888.

The first question depends upon the meaning of the words "which could have been commenced in a county court" in s. 116 of the County Courts Act, 1888. This action could not have been commenced in the county court, the amount claimed being 500*l.*, which is beyond that court's jurisdiction. It was held in *Goldhill* v. *Clarke* (1) that, where the action was one of contract to recover more than 50*l.*, and the plaintiff only recovered 12*l.* by reason of a set-off, the plaintiff was entitled to costs, because the action could not have been commenced in the county court. That case is an express authority in the plaintiff's favour. The language of the County Courts Act, 1888, s. 116, differs from that of the Judicature Act, 1873, s. 67, upon which the case of *Chatfield* v. *Sedgwick* (2) was decided. The case of *Lovejoy* v. *Cole* (3) has no bearing on this case, the question there being whether there was an admitted set-off. In this case, moreover, the action was against the defendants for a joint tort, namely, the conversion of a motor car, which was obviously of a value far exceeding the county court limit, inasmuch as it appears that the plaintiff has received 340*l.* already in respect of it out of the moneys paid into court by the other defendants. The plaintiff could not, therefore, have commenced this action in the county court, and he has in effect recovered in the action against

(1) 68 L. T. 414. (2) (1879) 4 C. P. D. 459.
(3) [1894] 2 Q. B. 861.

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the co-tortfeasors a sum far exceeding 40*s*. (1) The judge ought under the circumstances to have granted a certificate that there was a sufficient reason for bringing the action in the High Court. [He also cited *Stumm* v. *Dixon* (2); *Millington* v. *Harwood*. (3)]

E. Grimwood Mears, for the defendant Mulliner. The test whether the action could have been commenced in the county court for the purposes of s. 116 is not the amount claimed by the plaintiff, but the amount recovered. The decision in *Lovejoy* v. *Cole* (4) really involves that construction of s. 116. The plaintiff has only recovered 40*s*. in respect of his claim against the defendant Mulliner, and therefore he could have commenced the action as against him in the county court. The plaintiff's argument assumes that the defendants were joint tortfeasors, but that, as a matter of fact, is not necessarily so. The learned judge at chambers appears to have thought that Mulliner was really only a nominal defendant, the real defendants being the Motor Carriage Supply Company, who received the proceeds of sale of the motor car. The doctrine that two tortfeasors must be considered as in pari delicto has been held to be only applicable where both must be taken to have known that the act was unlawful: per Lord Herschell L.C. in *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.* (5) It is submitted that, under the circumstances, there is no ground for interfering with the exercise by the learned judge of his discretion in refusing to grant a certificate.

Wheeler, Q.C., for the plaintiff, in reply. The case of *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.* (6) concerned the right of joint tortfeasors to contribution inter se, and has no bearing on the present case.

(1) The argument based on the contention that the action was against the defendants for a joint tort is only briefly indicated, for, as will be seen from the judgment, the Court were of opinion that on the pleadings the claim could not be treated as one in respect of a joint conversion by the defendants.

(2) (1888) 22 Q. B. D. 99.

(3) [1892] 2 Q. B. 166.

(4) [1894] 2 Q. B. 861.

(5) [1894] A. C. 318, at p. 324.

(6) [1894] A. C. 318.

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A. L. SMITH M.R. In this case the plaintiff brings an action, which in former times would have been called an action of trover, in respect of a motor car against two defendants, Mulliner and the Motor Carriage Supply Company. The statement of claim alleges two separate conversions, one by the defendant Mulliner, and the other by the Motor Carriage Supply Company. It states that on a certain date Mulliner refused to deliver up the car to the plaintiff, and then it alleges that the defendants, the Motor Carriage Supply Company, refused to deliver up the car to the plaintiff. It therefore alleges two distinct tortious acts on the part of the defendants respectively, though no doubt it goes on to claim as against the defendants jointly and severally a return of the car or its value. The defendant Mulliner paid 40*s.* into court, at the same time denying liability. The other defendants, the Motor Carriage Supply Company, pleaded in bar of the action, and did not plead payment of money into court in satisfaction of the claim, though it appears that they had paid into court a sum of 440*l.*, to abide further order, of which 340*l.* was afterwards paid out to the plaintiff, under circumstances which need not be detailed for the present purpose; and the action proceeded as against them. The plaintiff accepted the 40*s.* paid into court in satisfaction of his claim against the defendant Mulliner, and the action is therefore at an end as against him. The plaintiff then carried in his bill of costs against Mulliner for taxation, but the master refused to allow him any costs, on the ground that he was not entitled to any by reason of the provisions of the County Courts Act, 1888, s. 116. Thereupon the plaintiff appealed to Day J. at chambers against the decision of the master, and asked for a certificate that the action as against Mulliner was a proper one to be brought in the High Court. The learned judge refused the application, and against that refusal the plaintiff appeals to this Court.

The first question which arises is as to the true meaning of s. 116 of the County Courts Act, 1888. Before discussing the language of that section, I will refer to the analogous provision in force previously to 1888, which was the subject of the

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decision of this Court in *Chatfield* v. *Sedgwick*. (1) Sect. 67 of the Judicature Act, 1873, enacted that the provisions contained in the 5th, 7th, 8th, and 10th sections of the County Courts Act, 1867, should apply to all actions commenced or pending in the High Court of Justice "in which any relief is sought which can be given in a county court." The same argument was in *Chatfield* v. *Sedgwick* (1) put forward with regard to that section as is put forward in the present case with regard to s. 116 of the County Courts Act, 1888. Jessel M.R. said in giving judgment: "In my opinion this means where relief is sought of a kind which can be given by a county court, and does not mean where relief is sought only of such an amount as could be given by a county court." Brett L.J. said: "I am of opinion that the amount for which the writ was indorsed has nothing to do with the question." And Cotton L.J. concurred. Therefore we have an unanimous opinion by the Court of Appeal that, under the enactment then in force, what had to be looked at, in order to see whether the action could have been brought in the county court, was the character of the action, and not the amount claimed on the writ. In 1888 the County Courts Act, 1888, was passed for the purpose of consolidating the enactments with regard to county courts; and in s. 116, which is a section in pari materiâ with the section upon which *Chatfield* v. *Sedgwick* (1) was decided, the draftsman has for some reason or other chosen to alter the phraseology from that which was used in the former enactment. It is a common experience in a court of law to find that in codifying Acts the draftsman frequently alters the language of the old Act without any particular reason, except perhaps with an idea of improving the phraseology. The words used in s. 116 are, "which could have been commenced in a county court," instead of "in which any relief is sought which can be given in a county court." The question is whether the words used in s. 116 do not really mean the same thing as those used in the former enactment. I read them as meaning "which could 'properly' have been commenced in the county court," both as regards the character of

(1) 4 C. P. D. 459.

the action and the amount really involved. At what time is it to be ascertained whether the action is, as regards amount, properly within the jurisdiction of the county court? Not, in my opinion, at the time when the plaintiff is stating what amount he thinks fit to claim on the writ or statement of claim, but at the time when the amount recoverable is adjudicated on by the proper tribunal or otherwise ascertained by the result. It cannot depend on the amount which the plaintiff chooses to claim. If that is so, then, inasmuch as by the plaintiff's own admission, so far as the action against Mulliner is concerned, the sum of 40*s.* was sufficient to satisfy his claim, the action as against him is one which could properly have been commenced in the county court both as to kind and amount. I think, therefore, that the case is within s. 116, and the plaintiff is not entitled to costs. With regard to the cases cited, there has been some confusion on the subject, and I do not think the decisions can all of them be reconciled with one another. If it be necessary to decide between them, I prefer the decision of Hawkins and Lawrance JJ. in *Lovejoy* v. *Cole* (1) to that of Charles J. in *Goldhill* v. *Clarke* (2), which I have great difficulty in following. I think that, as Brett L.J. said in *Chatfield* v. *Sedgwick* (3), which was an express decision of the Court of Appeal with regard to words which, though not identical with those we have to construe, are in my opinion to the same effect, the amount the plaintiff claims has nothing to do with the matter. It is the amount which is in the result recovered that is material. With regard to the second question, namely, whether Day J. was right in refusing to give a certificate that the action as against Mulliner was a proper one to be brought in the High Court, I see no reason for interfering with the manner in which the learned judge exercised his discretion.

COLLINS L.J. I am of the same opinion. I have had some difficulty in arriving at the result of the decisions on this subject. One would have supposed that the rule in such a matter

(1) [1894] 2 Q. B. 861. (2) 68 L. T. 414.
(3) 4 C. P. D. 459.

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as this would long ago have been perfectly well ascertained, and it seems strange that the question should have remained so long in an indeterminate condition. Having considered the cases, I cannot reconcile the decision in *Goldhill* v. *Clarke* (1) with that in *Lovejoy* v. *Cole*. (2) The former decision seems clearly to have been to the effect that the amount claimed by the indorsement on the writ was to be looked at, in order to see whether the action was within the jurisdiction of the county court, whereas in the latter case, although the minds of the judges do not seem to have been very specifically addressed to the point, the decision appears necessarily to involve the result that the test is not the amount claimed in the writ, but the amount recovered in the action. We have to choose between those decisions. In order to make out which construction of the section is correct, it is necessary, as my Lord has pointed out, to consider the policy of the Legislature as expressed in the previous legislation on the subject. If we find that, previously to 1888, there was a well-ascertained policy of the Legislature with regard to the matter, that would manifestly afford much assistance in determining the meaning of the section. Now we find that, prior to 1888, the object of the Legislature as expressed in the provision of the Judicature Act which incorporates various sections of the County Court Act, 1867, appears to have been that, where a plaintiff had recovered in an action of a class which a county court could entertain no more than a certain sum which, if it had been claimed in the writ, would have brought the case within the jurisdiction of the county court, he should not recover any costs in the High Court, because he had chosen to sue in that court instead of the county court, unless the judge certified for or the Court or a judge allowed costs. Such was the intention of the Legislature at that time as authoritatively declared by the Court of Appeal in *Chatfield* v. *Sedgwick*. (3) The words of the Judicature Act, 1873, s. 67, with which the Court there had to deal, presented a little less difficulty from a grammatical point of view, in the way of the construction which they adopted,

(1) 68 L. T. 414.

(2) [1894] 2 Q. B. 861.

(3) 4 C. P. D. 459.

than do those of the Act which we have to construe. They were, "in which any relief is sought which can be given in a county court." With regard to these words, Jessel M.R. said, in answer to the very same argument as was addressed to us: "This means where relief is sought of a kind which can be given by a county court, and does not mean where relief is sought only of such an amount as could be given by a county court." Is there any real ground for supposing that the Legislature by the language which they have used in the County Courts Act, 1888, s. 116, intended to alter the law as decided by that case? I do not see any ground in reason or common sense for supposing that they did. Such, then, is the attitude of mind in which I approach the construction of s. 116. A very slight modification of the words actually used is all that is necessary to give them the effect which one would suppose to have been intended from a consideration of the previous legislation. It is only necessary to read the words "which could have been commenced" as equivalent to "which could have been 'properly' commenced," as suggested by my Lord, or to insert some other such phrase indicating that what is referred to is the character of the relief and not the amount claimed. We have in favour of this construction of the section the decision of the Divisional Court in *Lovejoy* v. *Cole* (1), which I have no hesitation in adopting. These considerations are sufficient to decide this case. The plaintiff's counsel put forward a contention, which might have given rise to an interesting discussion, if he had had the necessary materials upon which to base it at his disposal. If the cause of action set up had been a joint cause of action against the defendants, that might have raised more difficult questions. But the pleadings, when looked at, get rid of any such difficulty, for the plaintiff has elected in one and the same action, not to treat the defendants as jointly and severally liable for a joint tort, but has elected to state in his claim separate torts against them respectively, thus rendering it possible for each defendant to take the separate tort alleged against him and deal with it separately in his defence. The defendant Mulliner has paid in

(1) [1894] 2 Q. B. 861.

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40*s.* in satisfaction of the tort alleged against him, and the plaintiff has taken out that sum in satisfaction of that which he has constituted a separate cause of action against that defendant. I think that the case is, therefore, clearly brought within s. 116 of the County Courts Act, 1888.

With regard to the learned judge's refusal to give a certificate that the action was a proper one to be brought in the High Court, I see no reason whatever for interfering with the manner in which he has exercised his discretion.

Appeal dismissed.

Solicitor for plaintiff: *T. Durant.*

Solicitors for defendant Mulliner: *Piesse & Son.*

E. L.

Applied. Re MARRYAT (*decd.*). [1948] 1 All E.R. 796.

Considered. In re MARRYAT. [1948] 1 Ch. 398

C. A. 1900 *Nov.* 16.

[IN THE COURT OF APPEAL.]

POMPHREY *v.* THE SOUTHWARK PRESS.

Employer and Workman — Compensation — Review of Weekly Payment — Average Weekly Earnings before Accident—Average Amount Workman able to Earn after Accident—Apprentice—Value of Tuition—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), 1*st Schedule* (2.) (12.).

An apprentice sustained an injury to his right hand which prevented his working as a skilled artisan, and the indenture of apprenticeship was cancelled. On an application for compensation under the Workmen's Compensation Act, 1897, he obtained an award of a weekly payment based on his wages for the previous year. He returned to the employment of the same employers as a workman, at weekly wages higher than his wages at the time of the accident, but less than those that would be ordinarily paid to a workman employed on the same class of work, since the injury he had sustained affected his ability to earn full wages. On an application by the employers for the review and termination of the weekly payment, the county court judge dismissed the application, on the ground that the workman was earning less, by a sum equal to the amount of the weekly payment awarded, than if he had had the use of his right hand. On appeal:—

Held, that, on a review of a weekly payment made by award under the Act, the test to be applied is the difference between the amount of the average earnings before the accident and the average amount which the workman is able to earn after the accident; that in the absence of evidence of advantages incidental to the employment, and capable of being

appraised at a money value, the earnings before the accident must be determined by the wages received; that the county court judge was therefore wrong in refusing to review the weekly payment; but that the weekly payment should be continued at a nominal amount, in order to preserve the right of the applicant to make any further application that might become necessary.

Semble, that the value of the tuition given to an apprentice should not be taken into account in arriving at the amount of his average weekly earnings.

APPEAL from a decision of the judge of the Southwark County Court on an application to terminate a weekly payment under an award made under the Workmen's Compensation Act, 1897.

The applicant was apprenticed to a firm of printers, and while at work he met with an accident by which his right hand was crushed. The injury incapacitated him from skilled labour, and the indenture of apprenticeship was cancelled. Just before the happening of the accident he was earning as an apprentice 10*s*. 6*d*. a week. An application for compensation under the Workmen's Compensation Act, 1897, was made, and the county court judge awarded a weekly payment of 3*s*. 6*d*. At a later date the employers took the applicant back into their employment as a labourer, and he earned 11*s*. 2*d*. a week.

The employers applied under the 1st Schedule (12.) of the Act to the county court judge to terminate the weekly payment under the award, on the ground that the applicant was able to earn, and was earning, the same weekly wages as before the accident. The answer to this application was (1.) that, but for the injuries sustained by the accident, the workman would be earning a higher wage, and that the accident had impeded his full wage-earning capacity in the trade to which he was apprenticed, and (2.) that the injuries sustained in his right hand were still existing and were permanent, and were a permanent incapacity which prevented him from earning the wage he otherwise would earn. It was proved on the inquiry that the usual rate of wages for a labourer would be 18*s*. a week and that the average wages of a skilled workman were 38*s*. a week, which was the amount the applicant would have earned at the end of his apprenticeship. The county court judge was

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of opinion that the applicant was earning 3*s.* 6*d.* a week less than if he had had the use of his right hand, and he accordingly refused to terminate the weekly payment, and dismissed the application to do so.

The employers appealed.

G. S. Bower, for the employers. By the 1st Schedule (2.), "In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident," and in *Irons* v. *Davis* (1) and *Chandler* v. *Smith* (2) the Court pointed out that the inquiry should be what pecuniary loss the workman has suffered. These cases are directly in point.

Ruegg, Q.C., and *H. Newson*, for the applicant. The cases cited do not apply to an apprentice. In the case of wages given to an apprentice the value of the instruction received by him is taken into account, and the wages paid to him are not in proportion to the value of the work that he does. The only question in *Irons* v. *Davis* (1) arose out of the workman being put on his return to employment to a different class of work. His wages were the same in each case, and there was no pecuniary loss. The same observation as to pecuniary loss applies to *Chandler* v. *Smith*. (2) The Act was intended to benefit workmen, and a wide construction should be placed on the word "earnings." The words used in the Act are not "wages" or "amount paid," but "earnings," which may include, over and above the value of the tuition which was to qualify the apprentice to become a skilled artisan, matters incidental to his employment, such as his being clothed or boarded, or other benefits which are capable of appraisement in money.

[COLLINS L.J. In *Noel* v. *Redruth Foundry Co.* (3), which arose under the Employers' Liability Act, the same argument as to the value of tuition was raised on the word "earnings" used in that Act, but it did not prevail with the Court on

(1) [1899] 2 Q. B. 330. (2) [1899] 2 Q. B. 506.
(3) [1896] 1 Q. B. 453.

the ground that it was too vague to be contemplated by the Act.]

That case is open to review in this Court, and in fact the county court judge may be taken in this case to have put a value on the tuition. The 1st Schedule (2.) directs that regard shall be had to the difference between the average earnings before the accident and the average amount that can be earned after it. The county court judge has followed this rule and has had regard to both these matters, and his conclusion should not be overruled.

A. L. SMITH M.R. This is an appeal from a decision of a county court judge on an application to review an award of a weekly payment made under the Workmen's Compensation Act, 1897. The applicant was apprenticed to a firm of printers and he had his hand crushed. At that time he was earning 10*s.* 6*d.* a week. He took proceedings under the Act, and obtained an award for the payment of 3*s.* 6*d.* weekly. Owing to his injuries he was not able to work any more as an apprentice, and the deed was cancelled, but after some months he came back into the service of the same employers as a labourer, and in that capacity he earned 11*s.* 2*d.* a week, and no doubt was making more than he did before the accident. Thereupon the employers, under clause 12 of the 1st Schedule to the Act, made an application to the county court judge to review the weekly payment and put an end to it. They contended that it was a sufficient ground for their application that the applicant was suffering no loss of wages by reason of the injury he had sustained. The county court judge refused to accede to the application. This refusal must have been on one of two grounds. If it was on the ground that had the applicant not lost the use of one hand he might now be making more money than the wages he was actually receiving as a labourer, that is a consideration which clearly does not come within the Act. If the refusal was on the ground that the applicant had lost the tuition to which he would have been entitled if the apprenticeship had not been put an end to, that also, in my opinion, was not right. The true reading of the Act, as I have said

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before now, is that the average earnings before the accident and after it are to be compared. I am not prepared to say whether the word "earnings" might not in some cases include more than the cash paid as wages. For instance, I do not say that in the case of a gardener, supposing him to be within the Act, the fact that he was allowed a cottage free, worth say, 5*s*. a week, might not be taken into consideration in arriving at the amount of his weekly earnings. It is not necessary to decide any such question, because in this case there was no evidence that the applicant was earning more than his weekly wages of 10*s*. 6*d*. It has been suggested that the Act must be construed in favour of the workman, but it is an Act placing a liability on masters irrespective of negligence or misconduct, and no different rule of construction is applicable to it from the rules which should be applied to any other Act. The master has to pay something towards the sustenance of the injured workman, and the question is what amount he has to pay. It is reasonably clear what the amount of compensation is to be. In the case of total or partial incapacity for work resulting from an injury the compensation is to be a weekly payment not exceeding in amount 50 per cent. of the average weekly earnings, and there is nothing in the schedule providing compensation by way of damages or in respect of the sums that the workman might have earned but for the accident. Then, in arriving at the amount to be awarded, it is enacted in the 1st Schedule (2.) that it shall be fixed, regard being had to the difference between the amount of the average weekly earnings before the accident and the average amount which the workman is able to earn after the accident. The Legislature intended that the difference between these amounts should be taken as the basis of the award. In so deciding, I am merely following out what I said in *Irons* v. *Davis* (1), to which I adhere. I think that the county court judge was wrong in the decision that he gave, and that the employers are entitled to have the order originally made suspended. We are of opinion, therefore, that the Court should make an order such as was made in the case that I have mentioned, reducing

(1) [1899] 2 Q. B. 330.

the amount of the award to 1*d.* a week, so that the applicant will be entitled, if at any time it should become necessary, to apply to have the amount increased.

COLLINS L.J. I am of the same opinion. I think that counsel for the employers was right in saying that the point on which the judge appears to have decided is concluded by the decision of this Court in *Irons* v. *Davis*. (1) I take it to be clearly settled that the maximum amount which the injured workman can claim is to be measured by the difference between his earnings before the accident and what he can earn after it. The maximum that can be awarded is one-half the difference so ascertained. The county court judge has not proceeded on that basis, but on a comparison of what the applicant might have earned but for the injury caused by the accident and what he was actually earning. It must be remembered that it is something short of compensation for injury that the Act deals with. The provisions of the Act are very special, and bring in outside matters that could not have been dealt with before the Act, either under any existing statute or at common law. The Act is not of general application, but applies only to certain classes of workmen, so that it is not a relevant argument to say that the claimant does not get as full compensation as if he were entitled to bring and were bringing an action.

It has been urged that the applicant did before the accident earn larger sums than those taken as a standard on which to base compensation. That conclusion is arrived at by taking into consideration certain advantages incidental to his position as an apprentice. It is sufficient to say that as to this there was no evidence before us. The point was not taken in the county court, and no attempt was made to quantify in money the suggested advantages. It may be that incidental advantages should in certain cases be taken into consideration, but the point does not arise in this case.

STIRLING L.J. I also am of opinion that the appeal should be allowed. The Act, as has been clearly pointed out, is an

(1) [1899] 2 Q. B. 330.

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entire novelty, and, speaking for myself, I think that all decisions arising under it should be carefully founded on the words of the Act itself.

The sole elements that are to be taken into consideration, in arriving at the amount of the weekly payment that should be awarded in such a case as that before us, are the average weekly earnings before the accident and the average amount which the workman can earn after the accident. The earnings before the accident embrace cash payments, and possibly include other matters the value of which is capable of being estimated in money, such as clothes, board, and lodging; but on this point it is not necessary to express an opinion. As to the value of the tuition which it is suggested should be taken into account, speaking for myself, I should be of the opinion expressed by the two learned judges who decided *Noel* v. *Redruth Foundry Co.* (1), that it was not capable of being estimated. At all events, there is no evidence on these matters before us, and the case must be dealt with on the money earnings alone. From this point of view it falls within *Irons* v. *Davis* (2), and the appeal should be allowed.

Appeal allowed.

Solicitors for applicant: *Gibson, Usher & Co.*

Solicitors for employers: *William Hurd & Son.*

(1) [1896] 1 Q. B. 453. (2) [1899] 2 Q. B. 330.

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[IN THE COURT OF APPEAL.]

C. A. 1900 Nov. 16.

HOUGHTON *v.* SUTTON HEATH AND LEA GREEN COLLIERIES COMPANY, LIMITED.

Employer and Workman—Compensation—Average Weekly Earnings—Deductions from Wages — Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), 1*st Schedule*, (1.), (*a*).

By the rules of a colliery company 6*d.* a week was deducted from the wages of each miner for lamp oil supplied by the employers. On an application for compensation under the Workmen's Compensation Act, 1897, the county court judge took as the basis of his award the full weekly wages of the injured miner without regard to the weekly deduction therefrom. On appeal:—

Held, that the principle on which the award was based was correct.

APPEAL from a decision of a county court judge on an application for compensation under the Workmen's Compensation Act, 1897.

The application for compensation was made by the widow of a man who met with his death while working in a colliery. The wages of the deceased at and before the time of the accident were 1*l.* 10*s.* 11*d.* a week. The employers were in the habit of supplying oil for the lamps with which the miners worked, and it was the rule of the colliery that 6*d.* should be deducted every week from each man's wages for the oil so supplied. The county court judge made an award of compensation on the basis that the weekly earnings of the deceased were his full wages, irrespective of the deduction therefrom of 6*d.* a week for lamp oil.

The employers appealed.

Ruegg, Q.C., and *S. H. Leonard*, for the employers. The average earnings depend on the actual and not the nominal wages. The 6*d.* deducted has direct reference to the work done by the deceased, and was a necessary condition to his earning wages. The earnings are the balance of gain over expenditure—that is, what a man gets for his own use and benefit.

[They cited *Noel* v. *Redruth Foundry Co.* (1)]

(1) [1896] 1 Q. B. 453.

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Montague Lush, for the applicant. The question is what were the earnings of the deceased, and it is for the employers to shew that the county court judge was wrong in point of law. No principle has been put forward which would include this case, and yet exclude all the necessaries of life without which a man could not do his work. The earnings of a workman are the wages that his employer pays him, and from the master's point of view the wages are the full amount agreed to be paid, and not that amount subject to deductions. The case is the same whether the workman buys his necessaries, such as oil, of the employers or of a shopkeeper. If this award were made on the basis of a deduction of 6*d.* a week for oil, the company would be getting the benefit of a reduction in respect of oil which they were no longer supplying. The deduction itself may be within the Truck Acts, and it would be for the employers to shew that they had complied with the conditions imposed by the Acts.

Ruegg, Q.C., in reply.

A. L. SMITH M.R. I cannot say that the decision of the county court judge was wrong, though a great deal can be said on both sides. The workman who is now dead was a miner, and at the time of the accident was receiving as wages 1*l.* 10*s.* 11*d.* a week. In order to do his work he had to supply himself with lamp oil, and in the same way he had to supply himself with food, clothes, and other things which he required to enable him to work. Are his earnings any the less quoad what he receives from his employers because he has to meet certain expenses in order to earn the 1*l.* 10*s.* 11*d.*? Out of that sum he has to expend something for necessaries; but the county court judge made his award on the basis of the amount of the wages without regard to the deductions. I agree with the view that he took, because I cannot see where to draw the line if we say that this 6*d.* a week reduced the weekly earnings by that amount, since an employer might whittle away the weekly earnings by deductions from the wages of the workman for all sorts of necessaries supplied to him. I am not prepared to overrule the decision of the county court judge, and this appeal must be dismissed.

COLLINS L.J. I have not succeeded in eliciting in the course of this case any principle that, while excluding the cost of equipment necessary for the purpose of doing the work this man was engaged on, would include the cost of the oil supplied to him. It is not contended that deductions should be made from the wages for the expense to which the man was put for things necessary to enable him to work—for instance, the expense of his dinner, and the cost of getting to and from his work. I fail to see on what principle a distinction can be drawn between light, by which a man can see the coal on which he is at work, and implements, by means of which he can cut it. I think there is force in the view that was put in argument—that the matter should be looked at from the employers' point of view as well as from that of the workman, and that the whole sum is the same whether it be given in malt or meal. I think, therefore, that the county court judge was right in taking the full amount of the wages as the basis of the award.

STIRLING L.J. I also agree that we should not disturb the decision of the judge. The question before us arises in respect of a deduction of 6*d.* weekly for lamp-oil used by the workman in the course of his employment. It was necessary that he should have oil to enable him to see his work just as many personal things were necessary to the performance of his work. I do not find anything in the case to shew that the workman could not have bought oil where he pleased. If he had bought it elsewhere, and not from his employers, it could not be contended that the price could be deducted from his wages in arriving at his earnings. I do not see what difference it makes that by arrangement with his employers he bought the oil from them.

Appeal dismissed.

Solicitors for applicant: *Smiles & Litchfield, for J. Massey, St. Helens.*

Solicitor for employers: *W. N. Ellen, for E. Peace, Liverpool.*

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[IN THE COURT OF APPEAL.]

HATHAWAY *v.* THE ARGUS PRINTING COMPANY, LIMITED.

Employer and Workman—Compensation—Continuous Employment—Employment for Two Days a Week—Average Weekly Earnings—Earnings outside Employment—Work for same or other Employers—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), 1*st Schedule* (1.), (*b*).

A workman was under an agreement to work for his employers on the nights of Thursday and Friday in each week, for a period extending over two weeks, and at a fixed rate of wages for each night. During the rest of each week he worked at times for the same employers, when they had work to give him, and at other times for other firms carrying on a similar business to that of the employers. The workman was injured during the third week of his employment under the agreement. He claimed compensation under the Workmen's Compensation Act, 1897, and an award was made in his favour based on the weekly wages earned by him in respect of the two nights a week during which he worked under the agreement. On appeal:—

Held, that the employment for two nights a week was a continuous one, and that the earnings on those two nights were properly taken into account in determining the weekly payment to be made to the applicant:—

Held, also, that the amount received for casual work done for the same or different employers could not be taken into account in estimating the average weekly earnings of the applicant.

APPEAL from a decision of the deputy judge of the City of London Court on an application for compensation under the Workmen's Compensation Act, 1897.

The applicant was a printer's cutter, and he entered into an agreement with a printing company under which he was to work for them on the nights of Thursday and Friday in every week at a wage of 8*s.* 8*d.* each night. No definite duration for the employment was fixed, but it was to be determinable by a week's notice, and was to continue for more than two weeks. During the rest of each week the applicant was free to work where he pleased. He was in the habit of coming to the place of business of the employers to see if there was day-work for him, and if there was he stayed and worked for them. At

other times he inquired of other firms in the same trade if there was work for him to do, and if there was he stayed and worked for them. In either case he was paid for the work that he did. In the third week of his employment the applicant met with an accident, and he applied under the Act for compensation. It was proved that, in addition to the 17*s.* 4*d.* received weekly from the employers for the work on the nights of Thursday and Friday, the average weekly earnings received by the applicant from the same employers for what was termed, to distinguish it from the employment under the agreement, casual work, amounted to 14*s.*, and that the average weekly earnings from other masters were 8*s.* 8*d.* The deputy judge awarded a weekly payment of 8*s.* 8*d.*, being 50 per cent. of the average weekly wages of the applicant under the agreement with the employers, the other earnings of the applicant being left out of consideration.

The applicant appealed, and there was a cross-appeal by the employers on the ground that the employment of the applicant was not continuous for at least two weeks, and that he was not entitled to an award.

Minton Senhouse, for the applicant. The applicant's total weekly earnings averaged 2*l.* For the work done for the employers in whose service he was injured, his earnings averaged 17*s.* 4*d.* and 14*s.* weekly—the former amount for the times specified in the agreement, and the latter for the times arising out of contracts made on each occasion on which he asked for and obtained day-work. In the one case he had definite work agreed on beforehand, and in the other case he did not know till he got to the place of business whether he would get work. The county court judge has found that he had continuous work with his employers, and all that he received from them should be included in arriving at his average weekly wages, just as extra payment for overtime work would have been included. The county court judge was right as to continuous employment, for the relation of master and servant continued, and there was no break as in the case of a strike: *Jones* v. *Ocean Coal Co.* (1);

(1) [1899] 2 Q. B. 124.

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or the case of an accident incapacitating from work: *Appleby* v. *Horseley Co.* (1) *Small* v. *M'Cormick* (2) supports this view. The work done for other employers was part of his weekly earnings, and ought also to be taken into account.

Arthur Powell, for the employers. The employment of the applicant was not continuous. The effect of the cases of *Lysons* v. *Knowles* (3) and *Stuart* v. *Nixon* (4) is to shew that a labourer in casual employment does not come within the Act. Working for two nights a week did not constitute continuous employment, for on the Saturday morning the applicant left his employment and obtained employment elsewhere, and broke the continuity of his employment with the respondents. This case is not like that of illness, a holiday, or working short time, for in those cases the relation of master and servant still subsists, though the work is suspended. Earnings from overtime work might perhaps be included, for they may be said to arise out of the employment agreed on; but here the applicant went into the employment of other persons, and that was inconsistent with a continuous employment by the respondents. If the applicant is entitled to anything, he can only be entitled in respect of the work done under the agreement.

Minton Senhouse, in reply.

A. L. SMITH M.R. This is an appeal by a workman, who complains that the award made in his favour is insufficient, and there is a cross-appeal by the employers, who say that the applicant is not entitled to anything.

The claim is founded on work done for the employers under an agreement, casual work done for them, and work done for other employers. This last head is clearly not within the purview of the Act, and I will say nothing more about it. The applicant had a contract with the employers under which he was to work on the nights of Thursday and Friday in each week at 8*s*. 8*d*. a night. In the third week he was injured, and the claim for compensation arose, and the question is how his average weekly earnings are to be computed. The judge based his award on the aggregate wages for the two nights a week

(1) [1899] 2 Q. B. 521.
(2) (1899) 36 Sc. L. R. 700; 1 F. 888.
(3) [1900] 1 Q. B. 780.
(4) [1900] 2 Q. B. 95.

on which the applicant worked. For the employers, it is said that the applicant ought not to be given anything. We decided in *Lysons* v. *Knowles* (1) that to get at the average weekly earnings the workman must have been employed for two weeks, and for the purposes of to-day we must take that to be so. This is not said directly in the Act, but is arrived at in a round-about way, because the workman is to be compensated according to the scale fixed by the schedule which treats of average weekly wages, and that average cannot be got at without taking two weeks. In *Russell* v. *M'Cluskey* (2), Lord M'Laren's view was that an average could be arrived at when there was only one week's employment, but I do not see how that can be. However that may be, no decision so far has said that to get at average weekly earnings the workman must be employed every day of the week. It seems to me that there is no difficulty in dealing with the wages for the two nights, Thursday and Friday, in order to arrive at the average weekly wages. Then it is said that the employment must be continuous, and I agree that the Court has so held. This was a contract for a term extending over several weeks that the workman should be employed for two nights in each week, and I can see no break in continuity in the employment under such an agreement. Having got thus far, I think the judge was right in dealing with the 17*s.* 4*d.* as weekly earnings in respect of which an award could be made. Then it is said on the part of the applicant that he is also entitled to have taken into account the wages he received for casual services done for the same employers. He went to them and also to other persons, and worked when he could get from either any casual work. The work that he did in this way for the respondents had no continuity. It was not found to be continuous by the judge, and was not taken into consideration by him in his award. I think the judge was right in disregarding it, and that his award must be supported and these appeals dismissed.

COLLINS L.J. I am of the same opinion on both points. First, as to the two days in each week on which the man was

(1) [1900] 1 Q. B. 780. (2) (1900) 37 Sc. L. R. 931.

C. A. 1900

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Collins L.J.

employed by virtue of a contract which extended over several weeks, I think the case comes within the express words of the Act, and is not taken out of it by any difficulty in arriving at the average of his weekly wages. What we have to ascertain is for what period the workman has been in the employment of the same employer, and it appears that the applicant was in the employment of the respondents for over two weeks, though only for two days in each week. On such an employment there is no difficulty in arriving at the average weekly earnings.

As to the other point I felt some difficulty. The question is whether casual work done for the same employer can be brought in to swell the average earnings. On consideration I think this casual employment is not "employment under the same employer" which can be taken into account. This Court has said that when a workman is in the employment of a master at times separated by intervals, the arbitrator is not entitled to take into consideration the whole of the employment, but must consider whether the different periods of employment are not separated by intervals which negative continuity in the employment. Where the intervals are long, the conclusion is made easier that the employment is not continuous. It does not follow that because the intervals are short the employment is continuous. That must depend on the nature of the employment. To enable one to say that a series of short periods should be taken together and treated as a continuous term there must be some nexus to join them. There must be some contract express or implied which raises a reasonable expectation of continuity in the employment. In the absence of that nexus, casual engagements on non-contract days do not constitute one continuous employment, for they are not bound together. That is in effect what the judge has found in this case; and I do not think that the applicant could be said to have been in the employment of the same employers so far as these casual jobs are concerned, so that they could be treated as a continuous employment.

STIRLING L.J. I am of the same opinion. We are bound by the decisions of this Court in *Lysons* v. *Knowles* (1) and

(1) [1900] 1 Q. B. 780.

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Stirling L.J.

Stuart v. *Nixon* (1) that to arrive at average weekly earnings there must have been employment for at least two weeks. I agree that to constitute continuous employment it is not necessary that it should have extended to every day of the week. That being so, I have to apply these principles to the present case. The agreement was to serve two days in every week for a period extending beyond two weeks, and under those circumstances I can see no difficulty in arriving at the average weekly earnings. There is nothing, in my opinion, to exclude the applicant from recovering compensation ascertained on the basis of the wages that he earned under the agreement. Then comes the question whether the earnings of the applicant, paid to him by the same employers but in respect of work done on other days of the week than those covered by the agreement, are to be treated, in assessing the amount of compensation, as earnings made in the employment of the same employer. I have had some difficulty in seeing why they should not be included, but I do not differ from the conclusion arrived at by my learned brethren.

Appeal dismissed.

Solicitors for applicant: *Griffith & Gardiner.*
Solicitors for employers: *William Hurd & Son.*

(1) [1900] 2 Q. B. 95.

A. M.

1900
Oct. 31.

YATES *v.* TERRY.

Practice—County Court—Garnishee Summons—Attachment of Debt—Balance in hands of Garnishee.

The decision in *Rogers* v. *Whiteley*, [1892] A. C. 118, that a garnishee order in the ordinary form in the High Court attaches the whole of the money due from the garnishee to the judgment debtor, even although that amount exceeds the judgment debt, applies to a garnishee summons in the ordinary form in the county court.

Appeal from the decision of the deputy judge of the Liverpool County Court.

The defendant was the receiver and manager of the Wirral and Wallasey Cycle Company, Limited, which was in liquidation. On February 20, 1900, an order was made upon him by the Court to pay to one William Henderson, for salary and services, the sum of 50*l.* 1*s.* 6*d.* On February 21 a garnishee summons was served upon him in the county court action of *Jones* v. *Henderson*, in which one Jones had recovered judgment against Henderson for the sum of 37*l.* 18*s.* 4*d.* The garnishee summons followed the ordinary county court form, and called upon the garnishee "to shew cause why an order should not be made upon you for the payment of the amount of the said judgment, or so much thereof as shall equal the amount of the debts due and accruing from you to the said William Henderson. And take notice that, from and after the service of the summons upon you, all such debts are attached to answer the said judgment, and that if you shall pay the said debts to the said William Henderson, or otherwise dispose of them, you will be liable to be committed for contempt."

On February 27, 1900, Henderson assigned to the plaintiff the sum of 16*l.* 17*s.* 8*d.* due to him from the defendant, and on February 28 he gave the defendant due and proper notice of this assignment. The defendant, considering himself bound by the garnishee summons, did not pay any money to the plaintiff. Another garnishee summons in respect of the sum of 21*l.* 4*s.* 7*d.* was served upon the defendant on March 15,

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and he thereupon paid the whole amount in his hands into court. This action was then brought for 12*l.* 3*s.* 2*d.*, being the balance of the sum of 50*l.* 1*s.* 6*d.*, after deducting the sum of 37*l.* 18*s.* 4*d.* attached by the garnishee summons. The deputy county court judge gave judgment for the plaintiff on the ground that the garnishee summons only attached such an amount of the debt as would satisfy the judgment.

The defendant appealed.

Cuthbert Smith, for the appellant. The county court judge was wrong. The garnishee summons bound all the money in the defendant's hands, and he had no right to part with any of it. *Rogers* v. *Whiteley* (1) decides that this is so with respect to a garnishee order nisi in the High Court, and there is no practical difference between such an order and the garnishee summons in the county court.

Segar, for the respondent. *Rogers* v. *Whiteley* (1) does not apply, since the form of the county court garnishee summons differs from the form of the High Court garnishee order nisi. The High Court form orders that "all debts" owing and accruing due from the garnishee to the judgment debtor be attached to answer the judgment recovered by the judgment debtor, and it was on that expression "all debts" that the decision in *Rogers* v. *Whiteley* (1) turned. The county court form says "all such debts" are attached, and thus limits the garnishee order to such a sum as may be sufficient to pay the judgment debt.

LAWRANCE J. In my opinion the learned deputy county court judge was wrong, and I think so because it seems to me that the county court form of garnishee summons and the High Court form of garnishee order are in effect precisely the same.

KENNEDY J. The claim in this case is made by a person to whom a valid assignment was made by Henderson of a debt of 16*l.* 17*s.* 8*d.* That assignment was served on Terry, who was then subject to a garnishee summons for 37*l.* 18*s.* 4*d.*,

(1) [1892] A. C. 118.

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and who had in his hands owing to Henderson the sum of 50*l.* 1*s.* 6*d.* It was clearly impossible for him to act upon the assignment without depriving himself of the power to obey the garnishee summons. But it is contended that he ought so far to have acted upon the assignment as to pay over the balance after satisfying the garnishee summons, and for that amount this action was brought. Terry's defence is that by the terms of the garnishee summons he was bound to hold all the money due to Henderson in his hands, and as a matter of fact it appears that a second garnishee summons was served upon him a few days after, which was sufficient to swallow up the whole sum which he held as due to Henderson. He then paid the whole amount into court, and this action was brought by the assignee, who contended that if he had paid out the balance to him on receiving notice of the assignment, that amount would not have been affected by the second garnishee summons. The deputy county court judge gave judgment against Terry; and in my opinion he was wrong in so doing, because I cannot distinguish the garnishee summons in its legal results from the garnishee order which was the subject of the decision in *Rogers* v. *Whiteley* (1), in which it was held that the garnishee order attached the whole of the moneys in the hands of the garnishee. I can see no justification for distinguishing the county court form of garnishee summons from the form of order used in the High Court. The summons attaches all debts due and owing to Henderson in the hands of the garnishee, and in my opinion the garnishee was bound to keep the whole amount due to Henderson to answer the garnishee summons. The appeal, therefore, must be allowed.

Appeal allowed.
Leave to appeal granted.

Solicitors for appellant: *Sharpe, Parker & Co., for Bielby & Welby, Liverpool.*

Solicitors for respondent: *Field, Roscoe & Co., for Yates & Co., Liverpool.*

(1) [1892] A. C. 118.

A. P. P. K.

In re An Arbitration between STRINGER and RILEY BROTHERS.

1900
Nov. 7.

Practice—Arbitration—Arbitrator functus officio—Power to remit Matters referred—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 10.

The Court has power under s. 10 of the Arbitration Act, 1889, to remit the matters referred to the reconsideration of the arbitrator even although the arbitrator be functus officio.

Motion to set aside an award on the ground that it was ultra vires.

A dispute having arisen between Mr. Stringer and Messrs. Riley Brothers, it was agreed on March 15, 1900, to refer the matter to arbitration, and each party appointed an arbitrator. The submission incorporated the provisions of the Arbitration Act, 1889. On March 31 the arbitrators appointed an umpire. On July 12 the umpire heard evidence, and also heard the two arbitrators, on the matters in dispute. Neither of the parties was legally represented before him.

On July 28 the umpire informed the parties that he had made his award, and that it could be taken up on payment of the costs. Stringer accordingly paid the costs and took up the award. On perusing it he found that he could make nothing of it, as it did not deal with all the questions in dispute. It was then discovered that when the award had been drawn up the umpire had not seen the submission to arbitration. Stringer accordingly, without informing Riley Brothers, caused the award to be returned to the umpire, who destroyed it and, after perusing the submission, made a fresh award, which it was now sought to set aside.

Germaine, for Riley Brothers. The award is bad. The umpire, having made the first award, was functus officio, and had no power to recall it and draw up another: *Mordue* v. *Palmer*. (1) The only power that he has of even correcting a clerical error in the award is that given by s. 7 (*c*) of the Arbitration Act, 1889.

(1) (1870) L. R. 6 Ch. 22.

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STRINGER AND RILEY BROTHERS, *In re.*

Roskill, for Stringer. The first award, not having been made under the submission, was no award, and the umpire in making it did not become functus officio. He was only acting under the submission when he made the present award, which is therefore valid.

The Court has a general power under s. 10 of the Arbitration Act, 1889, to remit the matter to the reconsideration of the umpire. (1)

Lancelot Sanderson, for the umpire.

Germaine replied.

LORD ALVERSTONE C.J. In this case the submission to arbitration contained a clause that each party was to appoint an arbitrator, and that the arbitrators were to appoint an umpire, and it embodied the provisions of the Arbitration Act, 1889. An award has been made, and to that award an objection has been taken of a somewhat curious kind. The parties appearing by their arbitrators—it being agreed that no legal representatives should appear—did not apparently hand the submission to the umpire, or, if they did do so, the umpire appears to have mislaid it. Thereupon, thinking he understood the points in difference from the statements of the two arbitrators, he made an award. Now, as there is no dispute as to the bona fides of the parties it must be taken that that award did not deal with the matters really in issue between the parties. The award having been taken up in the ordinary course by Mr. Stringer, one of the parties to the arbitration, he found that he could not understand it, and that it did not deal with the matters in dispute; thereupon he sent it back to the umpire. It would have been better if Mr. Stringer had given notice to Messrs. Riley Brothers of what he was doing; but no great mischief was done, because a short time afterwards

(1) By the Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 7, "The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power . . . . (*c*) to correct in an award any clerical mistake or error arising from any accidental slip or omission."

By s. 10, sub-s. 1, "In all cases of reference to arbitration the Court or a judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire."

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STRINGER AND RILEY BROTHERS, *In re.*

Lord Alverstone C.J.

they heard what had happened. The award went back to the umpire, and then for the first time he became aware that there was a written submission, and he accordingly perused the submission and drew a fresh award in proper form.

I think that second award was bad. In my opinion, the old authorities are still binding upon us, and I think that when the umpire had made the first award he was functus officio. Having purported, as Mellish L.J. puts it in *Mordue* v. *Palmer* (1), to sign "a document as and for his award he is functus officio, and he cannot of his own authority remedy any mistake." He was, therefore, not in a position to make another award. But I am clearly of opinion that under s. 10 of the Arbitration Act, 1889, the Court has a general power and jurisdiction to remit the matters referred to him for reconsideration. That section runs thus: "In all cases of reference to arbitration the Court or a judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire." It is not suggested that the umpire is not impartial, or that he was not properly chosen. The only suggestion is that by carelessness or by not having the actual submission before him he made out a document which could be of no good to the parties.

Speaking for myself, until I am corrected by the Court of Appeal, I think this is the kind of case in which the Court would wisely exercise its discretion in sending the case back. And, if there is then any matter which the parties desire to raise through their arbitrators, it can then be raised.

I think that it was necessary for Mr. Germaine to come here and invoke the action of the Court to get the award set aside, and therefore I think that there should be no costs on either side.

KENNEDY J. I entirely concur.

Solicitors: *Robbins, Billing & Co.; Williamson, Hill & Co., for Marsden & Marsden, Blackburn; J. E. & H. Scott, for George H. Lewis, Blackburn.*

(1) L. R. 6 Ch. 22, at p. 31.

A. P. P. K.

1900
Oct. 30;
Nov. 3.

JENNINGS *v.* MATHER.
GRAY, CLAIMANT.

Bankruptcy — Interpleader — Property Divisible among Creditors — Property held on Trust—Assignee for Benefit of Creditors—Right of Indemnity over Assets of Trust—Lien passing to Trustee in Bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

The assignee under a deed of assignment for the benefit of creditors incurred debts in the course of carrying on the business. Judgment having been obtained against him, the execution creditor seized some of the assets of the business. The assignee having meanwhile become bankrupt, these assets were claimed by the trustee in bankruptcy. In an interpleader issue:—

Held, that although the assets were property held on trust by the bankrupt, and so by virtue of s. 44 of the Bankruptcy Act, 1883, were not divisible among his creditors, yet that he had a right of indemnity over them in the nature of a lien which passed to his trustee in bankruptcy, and that therefore the trustee in bankruptcy was entitled to succeed as against the execution creditor.

APPEAL from a decision of the county court judge of Bradford.

In June, 1898, Messrs. Smales Brothers & Co., who were carrying on business at Bradford, executed a deed of assignment by which they assigned all their trade assets to one Mather as a trustee for the benefit of their creditors. By this deed Mather was to carry on the business, and to apply the profits partly to paying the creditors 15*s.* in the pound, and subject to this in trust for Smales Brothers.

Mather carried on the business in accordance with the trust, and in so doing ordered goods from one Jennings. Jennings, being unable to obtain payment, sued Mather, and got judgment against him, on which execution was issued, and the sheriff seized under the execution certain of the trade assets. In the meantime Mather had absconded and had been adjudicated bankrupt, one Gray being appointed his trustee in bankruptcy. Gray then claimed the goods seized by the sheriff, and the sheriff interpleaded. By consent the goods were sold, and the proceeds, amounting to 120*l.*, were paid into court.

Gray, the trustee in bankruptcy, was the claimant, and Jennings, the execution creditor, the defendant in the interpleader issue. The county court judge gave judgment for the defendant, holding that the goods seized were trust property, and therefore, by virtue of s. 44 of the Bankruptcy Act, 1883, did not pass to the trustee in bankruptcy of Mather.

The claimant appealed.

J. G. Wood, for the claimant. The county court judge was wrong. Where a trustee, executor, or administrator carries on business for the benefit of the trust, he renders himself personally liable for all goods ordered by him, and the creditors have no right of recourse to the trust estate. The trustee in bankruptcy of a bankrupt trustee or executor who has been carrying on such a business has to protect the interests of all the creditors of the bankrupt—that is to say, in this case he would represent the interests both of the original creditors of Smales Brothers and also of the creditors, such as the defendant here, whose remedy was to prove against Mather's estate. [He cited *In re Johnson, Shearman* v. *Robinson* (1); *Owen* v. *Cronk* (2); *Burt, Boulton & Hayward* v. *Bull* (3); *Dowse* v. *Gorton*. (4)]

Muir Mackenzie, for the defendant. The question turns entirely on the construction of s. 44 of the Bankruptcy Act, 1883, which says "the property of the bankrupt divisible among his creditors . . . . shall not comprise . . . . property held by the bankrupt on trust for any other person." That makes it clear that these assets did not pass to the trustee in bankruptcy, and that he has no claim to them. *Dowse* v. *Gorton* (4) is an authority for saying that all goods bought by the trustee while carrying on the business become assets of the trust estate. No doubt Mather might have been able to assert a right of indemnity over those assets for his personal liabilities in respect of the trading, but that is not sufficient to give his trustee in bankruptcy any claim to them.

J. G. Wood, replied.

Cur. adv. vult.

(1) (1880) 15 Ch. D. 548.
(2) [1895] 1 Q. B. 265.
(3) [1895] 1 Q. B. 276.
(4) [1891] A. C. 190.

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JENNINGS v. MATHER.

1900. Nov. 3. KENNEDY J. In this case there is an appeal from the decision of a county court judge giving judgment for the defendant in an interpleader issue in the ordinary form, in which Gray, the present appellant, was plaintiff and Jennings defendant. The goods in question, which had been seized by the sheriff under an execution, have been sold, and the proceeds, amounting to some 120*l.*, are now in court. The facts, as found by the county court judge, are shortly these: A trader named Smale called a meeting of his creditors, and there was an arrangement by which one Mather became assignee of the trading estate of Smale on trust to carry on the business, and out of the profits of the business to pay certain dividends to the creditors, and upon further trust to stand possessed of the property after the payment of those dividends for the insolvent trader. In the course of the carrying on of the business by Mather in pursuance of this arrangement, Jennings sold to Mather certain goods, and thus became a creditor of Mather. He obtained judgment against Mather, and seized in execution the goods in question, which formed part of the trading estate. Mather became bankrupt and absconded, and the question arises between the execution creditor and Mather's trustee in bankruptcy as to the ownership of the goods. The county court judge has decided that the defendant, the execution creditor, is entitled to succeed—in other words, that the trustee in bankruptcy has not made out any title to or interest in the goods; and we have now to say whether the county court judge is right or not. The basis of his decision is that he thinks the case is governed by s. 44 of the Bankruptcy Act, 1883, and that these goods, being goods held on trust by the bankrupt, were goods in which Mather's trustee in bankruptcy had no interest or title. I have come to the conclusion that the county court judge was wrong, and, as the case seems to me one of some interest and difficulty, I will endeavour to state fully my reasons for that conclusion.

I think that there is no doubt at all that the county court judge was right in holding, first, that in an interpleader of this kind it is not sufficient to shew that the defendant has no title, but that the claimant must make out some title in himself;

and, secondly, that he was right in treating this property (in a sense to which I will afterwards refer) as trust property—that is to say, as property which was an asset of the trading estate at the time it was taken in execution.

I differ from him as to the inference which he has drawn as to the effect of the Bankruptcy Act, 1883, on that position.

In the first place, it is obvious that, while the principle is right upon which the county court judge has held that there must be shewn an affirmative title on the part of the claimant in such an interpleader, nevertheless, if the goods seized are trust goods, there is no sort of title to them in the execution creditor. He had no business when trading with Mather to seek to get satisfaction of a debt incurred by Mather out of property which Mather held as a trustee. The basis of the decisions on this question is to be found in *Dowse* v. *Gorton* (1), where it was held that assets as they are acquired, whether by an administrator, an executor, or a trustee, who, in conformity with his trust, is carrying on a business, are not the property of the administrator, executor, or trustee, but form part of the trust property—that is, they are property to which those to whom the administrator, executor, or trustee incurs debts in trading have no right to look in the sense of being able to seize them in execution, because they are not the goods of the trader, but are the goods of the trust. A case which seems to me to illustrate that very well is *In re Morgan, Pillgrem* v. *Pillgrem*. (2) In that case a testator's trading business had been carried on by his executor in accordance with the testator's directions, and a creditor created in the course of that trading sought to enforce rights against property which had originally been the property of the testator, and had passed to the executor in the course of his carrying on the testator's business. Fry J. (as he then was) in his judgment says (3): "The argument in support of the summons has almost gone the length of suggesting that trust property in the hands of a trustee may be seized by his execution creditor. In my judgment nothing is plainer than this, that the property which can be taken under an

(1) [1891] A. C. 190. (2) (1881) 18 Ch. D. 93.
(3) 18 Ch. D. at p. 101.

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execution is only that property to which the execution debtor is beneficially entitled, and that no property of which he is only a trustee can be taken." The case went to the Court of Appeal, and in giving judgment there Jessel M.R. said (1): "At a subsequent period he" (that is, the creditor) "issued execution against the chattels of his debtor, and among other chattels were the leasehold premises, and in order to enable the sheriff to seize, the lease was handed to him. I asked the counsel if the sheriff could seize trust property for the debt of the trustee, and it was admitted that he could not. The result was that the execution gave the creditor no better title than he had before; therefore he got no title to the lease under the execution, and therefore he has no legal title to the property, and as to his equitable interest he must be postponed to the cestuis que trust." That the creditor's only right in a case of this kind is to sue the administrator, executor, or trustee personally is, I think, decided by the case of *Dowse* v. *Gorton*. (2) Turning to the report of that case in the Court of Appeal (3), we find Lindley L.J. saying (4): "Now let us look at the rights of those who have dealt with executors after his" (the testator's) "death. The right of those is to sue the executors. I believe there are some very exceptional cases in which subsequent creditors can get the assets, and I think there is authority for saying that funeral expenses can be got out of the assets; but with those exceptions, the right of subsequent creditors is to sue the executors. They have nothing to do with the assets of the testator at all." The House of Lords, when the case came before them, though they varied the order of the Court of Appeal, in no way dissented from that judgment.

There is a further case, which was before the county court judge, of *In re Evans*, *Evans* v. *Evans*. (5) In that case an attempt was made in a court of equity, by a creditor who had a claim against the administratrix of an estate, who was carrying on the business of the estate, to get a sort of charge upon goods which were in her possession in the course of her

(1) 18 Ch. D. at p. 104.
(2) [1891] A. C. 190.
(3) (1889) 40 Ch. D. 536.
(4) 40 Ch. D. at p. 542.
(5) (1887) 34 Ch. D. 597.

business, and which had been supplied by the creditor, and had not been paid for. Cotton L.J. in the course of his judgment says (1): "The creditor cannot have any direct claim against the intestate's estate. He cannot have anything higher than a right to be substituted to the right of the administratrix to indemnity. Where a business is carried on by a trustee with proper authority, and he buys for the business goods for the price of which he is personally liable, the cestuis que trust cannot say to the trustee: 'These goods belong to us, and we will take them, without regard to your right to indemnity.' But have the creditors any claim against the goods on that ground? The goods now in question were acquired for the purposes of the business, and went into the business. The infant child of the intestate claims them as belonging to the estate, and in my opinion he has a right so to claim them, subject to the right of the widow to be indemnified out of them against all claims in respect of them so far as she has not lost such right by being a debtor to the estate, and whether she has lost that right is a question depending on the result of the general account."

It seems to me clear that, on the undisputed facts in the present case, the goods in question come within these decisions, and, so far as common law is concerned, they became as they came in assets of the assignor—that is to say, assets of the trust estate. This is plain both from *Abbott* v. *Parfitt* (2), which was cited by Lord Herschell in *Dowse* v. *Gorton* (3), and from *Moseley* v. *Rendell.* (4) If that is so, something follows in equity which, it seems to me, the county court judge has overlooked. While there can be no right of a creditor created in the course of the trading to treat as goods of the trustee goods which form part of the trust estate, still it is equally clear that the trustee has a right and interest in those goods, because he has a right to an indemnity in the nature of a lien over those goods. It necessarily follows, as it seems to me, that the trustee has a right to prevent any person from carrying away those goods, and to say to everybody, including the cestuis que trust, "I am entitled to an indemnity out of those goods, and have,

(1) 34 Ch. D. at p. 601.
(2) (1871) L. R. 6 Q. B. 346.
(3) [1891] A. C. 190.
(4) (1871) L. R. 6 Q. B. 338.

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therefore, a pecuniary interest in them." Of course, when the accounts come to be made up, if it should appear that nothing is due to the trustee on the trading, there is nothing in respect of which he needs to be indemnified, and his lien over the goods is gone; but until the accounts are made up he is entitled to a lien over all the assets of the estate. A lien (putting aside the question of bankruptcy, with which I will deal directly) has always been held to be sufficient title as against the world to hold the goods until that lien is satisfied, or is proved not to exist. We are bound, as it seems to me, to enforce the equitable rights of a trustee who, properly and in accordance with his trust, is carrying on a business for the benefit of the trust estate. To refer again to the case of *Dowse* v. *Gorton* (1), Lord Herschell there says (2): "I think it is clear that where a business has been carried on under such an authority as was conferred upon the executors by the will of this testator, they would be entitled to a general indemnity out of the estate as against all persons claiming under the will"; and Lord Macnaghten (3) says: "Creditors of a deceased trader whose business has been continued by his executors, when they come for an administration decree, must treat the continuance of the business either as proper or as improper. If the business has been properly continued as between the executors and the creditors, or if the creditors choose to treat it so, which comes to the same thing, the executors are entitled to be indemnified against all liabilities properly incurred in carrying it on." But perhaps the fullest and clearest exposition of the position of Mather—in whose shoes, subject to the bankruptcy point with which I will deal directly, Gray, the trustee in bankruptcy, stands—is given by Jessel M.R. in the case of *In re Johnson, Shearman* v. *Robinson*. (4) In the course of his judgment in that case he says (5): "I understand the doctrine to be this, that where a trustee is authorized by a testator, or by a settlor—for it makes no difference—to carry on a business with certain funds which he gives to the trustee

(1) [1891] A. C. 190.
(2) [1891] A. C. at p. 199.
(3) [1891] A. C. at p. 203.
(4) 15 Ch. D. 548.
(5) 15 Ch. D. at p. 552.

for that purpose, the creditor who trusts the executor has a right to say, 'I had the personal liability of the man I trusted, and I have also a right to be put in his place against the assets; that is, I have a right to the benefit of indemnity or lien which he has against the assets devoted to the purposes of the trade.' The first right is his general right by contract, because he trusted the trustee or executor: he has a personal right to sue him and to get judgment and make him a bankrupt. The second right is a mere corollary to those numerous cases in Equity in which persons are allowed to follow trust assets. The trust assets having been devoted to carrying on the trade, it would not be right that the cestui que trust should get the benefit of the trade without paying the liabilities; therefore the Court says to him, 'You shall not set up a trustee who may be a man of straw, and make him a bankrupt to avoid the responsibility of the assets for carrying on the trade:' the Court puts the creditor, so to speak, as I understand it, in the place of the trustee."

The case, therefore, stands thus: Mather, the trustee, has a right at any moment, and with regard to any of the assets of the trust estate, to say, "These shall not be taken away. I have a right of indemnity personal to myself; and to that extent also I have a right on behalf of the creditors of the estate, who can only reach its assets through me." He, therefore, clearly has far more than the interest of a bare trustee in these assets. He has a direct personal interest in maintaining his lien over them.

The only question that is left is, as it seems to me, whether this interest was sufficient to enable Mather to succeed as against the execution creditor in an interpleader issue. It is clear that the creditor himself has no right; but it is equally clear that in such a proceeding the claimant must shew a definite title in himself to the goods in question. Had Mather, if he were before the Court, such a definite title or interest? In my opinion, he had. It is no novel doctrine that the Court is bound in interpleader cases to recognise equitable rights. I need not do more than refer to the cases which seem to me to establish that proposition. The first that I know of was

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Rusden v. *Pope*. (1) Then there was an emphatic judgment of the late Lord Esher (then Brett J.) in *Duncan* v. *Cashin* (2) to the same effect; and the latest case was a decision of Mathew and Wills JJ. in *Usher* v. *Martin* (3), in which they distinguished the case of *Richards* v. *Jenkins* (4), in the Court of Appeal, which at first sight appears to be to the contrary effect.

Assuming then, as I do, that the execution creditor had a perfectly good judgment against Mather, and that as against him he had no right to seize the goods of the trust estate in Mather's hands, what is the position of Mather's trustee in bankruptcy—Gray? Gray simply represents Mather's estate, and holds his goods in trust for his creditors. Sect. 44 of the Bankruptcy Act, 1883, is perfectly plain and explicit that Mather's trust property did not pass to his trustee in bankruptcy. It is not divisible among his creditors. That is clear. But, on the other hand, it is equally clear that Mather had a lien or right of indemnity over the assets of the trust estate which will be absolutely defeated if judgment is given in favour of the defendant, the execution creditor. Now, it seems to me settled law that if a person is in possession of goods of which in one sense he is merely a trustee, but over which he has a lien—e.g., as a factor—his trustee in bankruptcy has never been obliged to part with those goods until it has been shewn that that lien has been satisfied. In other words, the trustee in bankruptcy of a factor has a right to maintain the factor's lien in the interest of the creditors of the estate. I will quote from the last edition of Williams on Bankruptcy, 7th ed. (by E. W. Hansell, 1898), p. 177, as to trusts arising in the course of the business of a bankrupt: "Thirdly, there is the class of trusts where the bankrupt trustee has not the absolute or general property, but only a special property—e.g., where the property is vested in the bankrupt as an agent, such as a factor, entrusted with goods to sell for his principal, or a banker entrusted with bills for collection. Such property, if distinguishable from the mass of the bankrupt's property, does not

(1) (1868) L. R. 3 Ex. 269.
(2) (1875) L. R. 10 C. P. 554, at p. 558.
(3) (1889) 24 Q. B. D. 272.
(4) (1887) 18 Q. B. D. 451.

pass to the trustee in bankruptcy, but the trustee has a right to enforce any lien or other right on the goods or other property in his possession which the bankrupt factor would have had against his principal had he remained solvent." Now, it seems to me that the carrying on of a business of this kind gave an equitable lien, and I cannot see why that lien should not have passed to the trustee in bankruptcy of the person carrying on such a business. No doubt the property of the trust estate cannot be said to be property divisible among the creditors, yet it is property over which the bankrupt had a lien. Every trade creditor who has a personal right in this case against Mather, and has the right to prove against Mather's estate in the bankruptcy in respect of debts incurred by Mather in the course of carrying on this business, has also a right through Mather to a satisfaction of that lien which Mather had over what is in one sense, no doubt, trust property. It seems to me that that lien has passed to the trustee in bankruptcy, and I think that judgment should be given in his favour. Of course, it follows from what I have said that the trustee in bankruptcy cannot deal with these assets, because the cestuis que trust will have a right to have them brought into account, and it will then appear whether Mather's lien was satisfied or not. All we have to do now is to say that the plaintiff, the trustee in bankruptcy of Mather, has established such a right as against the defendant, the execution creditor, as to entitle him to judgment in the interpleader issue.

LAWRANCE J. I entirely agree.

Appeal allowed.
Leave to appeal granted.

Solicitors for claimant: *Wrensted & Hind, for Scott & Holmes, Bradford.*

Solicitor for defendant: *G. R. Stubbs, for Gaunt, Hines & Bottomley, Bradford.*

A. P. P. K.

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Oct. 31.

JONES *v.* DAVIES.

Bastardy—Affiliation Order — Application by Married Woman living with Husband at Date of Application—Bastardy Laws Amendment Act, 1872 (35 & 36 *Vict. c.* 65), *s.* 3.

A married woman, who at the date of the application is living with her husband, cannot obtain an order for the affiliation of her bastard child under the Bastardy Laws Amendment Act, 1872, s. 3.

CASE stated by justices under the Summary Jurisdiction Acts.

On January 31, 1900, an information was preferred by Hannah Jones against David Davies, under s. 3 of 35 & 36 Vict. c. 65, alleging him to be the father of her bastard child, who was born on December 3, 1899. At the time of the birth of the child, and for some years previously, Hannah Jones was the wife of one Benjamin Jones, who was a seafaring man. Evidence was tendered (other than that of Hannah Jones or Benjamin Jones) to shew that Benjamin Jones was absent from home from February 23, 1899, to July 6, 1899. He then became aware of his wife's pregnancy, but continued to cohabit with her for about three weeks, when he again went to sea, returning again for a short period in September, 1899, when he again cohabited with her. He returned again on January 27, 1900, after the birth of the child, and accompanied his wife to lay the information, on which a summons was duly issued and served. He continued to cohabit with his wife until February 7, 1900, when, being advised by the solicitor who was acting for his wife that it was necessary that she should be living apart from her husband in order that she should obtain the affiliation order, he separated from her and went to reside in another part of the county. Another information was then laid by the wife against Davies on which a summons was issued and served, the first summons being withdrawn. At the hearing of the second summons the justices found as facts that Benjamin Jones became aware of his wife's pregnancy about four months after conception, and that with such knowledge he had con-

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tinued to cohabit with her, and that the alleged separation on February 7 was not a bonâ fide separation, but colourable and for the purpose of the proceedings, and that Benjamin Jones intended to cohabit with his wife when the proceedings were over. They therefore dismissed the information without going into the sufficiency of the evidence of non-access, or into that of Davies being the father of the child, holding that Hannah Jones was not a single woman within the meaning of s. 3 (1), but stated this case for the opinion of the Court.

S. T. Evans, for the appellant. The justices were wrong. The expression "single woman" has been used in all the Bastardy Acts, and it has been expressly held to apply to married women in *Rex* v. *Luffe* (2) and *Reg.* v. *Collingwood.* (3) It was contended that *Stacey* v. *Lintell* (4) and *Tozer* v. *Lake* (5) were authorities for saying that the order could not be granted where at the time of the application the woman was living with her husband. That is not so. In both those cases the woman had married after the birth of the bastard child, and by 4 & 5 Will. 4, c. 76, s. 57, a man marrying a woman who has children, whether legitimate or illegitimate, renders himself liable for their support. The test is, who is to be liable for the support of the child: *Peatfield* v. *Childs.* (6) There is no provision making the husband liable for the support of a child born of his wife's adultery, and, therefore, unless the putative father can be made liable, the child will have no one to whom it can look for support. It is sufficient to shew that the husband and wife were apart at the time of the conception: *Bosvile* v. *Attorney-General* (7), and mere condonation by the husband does not take away the wife's right to an affiliation order.

(1) By the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 3, "Any single woman who may be with child, or who may be delivered of a bastard child after the passing of this Act, may" make application for a summons to be served on the putative father, &c.

(2) (1807) 8 East, 193; 9 R. R. 406.

(3) (1848) 12 Q. B. 681.

(4) (1878) 4 Q. B. D. 291.

(5) (1879) 4 C. P. D. 322.

(6) (1899) 63 J. P. 117.

(7) (1887) 12 P. D. 177.

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Bryn Roberts, for the respondent. *Stacey* v. *Lintell* (1) and *Tozer* v. *Lake* (2) are clear authorities that an affiliation order cannot be obtained by a married woman who at the time of the application is living with her husband. In *Rex* v. *Luffe* (3) and *Reg.* v. *Collingwood* (4) it is plain that at the time of the application the woman was living apart from her husband. *Hardy* v. *Atherton* (5) shews that the question of support is not the true test, since it was there held that an affiliation order obtained by a woman before her marriage could still be enforced against the putative father, although by 4 & 5 Will. 4, c. 76, s. 57, her husband had by marrying her made himself liable to support the child.

S. T. Evans, replied.

LAWRANCE J. I think in this case that the magistrates were right, and I base my judgment on the short and simple ground that in no case has it been shewn that a married woman, who is living with her husband at the time the application is made, can be treated as being a single woman. No doubt the expression "single woman" in the Bastardy Acts caused some difficulty at first, but the Courts got over that difficulty by deciding that a married woman who was living apart from her husband might be treated as a single woman, but there is no case where she has been so treated while she is living with her husband. That she cannot be so treated is, I think, made perfectly clear by the decision in *Stacey* v. *Lintell* (1), where Mellor J. said (6): "It is unnecessary for us to discuss the cases which have decided, upon the construction of the earlier bastardy statutes, that the term 'single woman' is not restricted to a woman who has never married, for in the present case the mother at the time of the application was not living separate from her husband as in those cases, so that the ground on which they proceeded . . . . is removed from our consideration"; and Lush J., in concurring, said (7): "I think that, having married and living

(1) 4 Q. B. D. 291.
(2) 4 C. P. D. 322.
(3) 8 East, 193; 9 R. R. 406.
(4) 12 Q. B. 681.
(5) (1881) 7 Q. B. D. 264.
(6) 4 Q. B. D. at p. 294.
(7) 4 Q. B. D. at p. 295.

with her husband she cannot be considered as a 'single woman' within any construction which has been put on the term." That decision was, no doubt, present to the mind of the solicitor who acted for the applicant in this case, since we are informed that he advised the husband to separate from his wife before the application was heard; but the magistrates found as a fact that this separation was only colourable, and I think that they came to a right conclusion.

KENNEDY J. In my opinion, the case raises a question of some difficulty. The point that we have to decide is whether, the magistrates having found conclusively—and, as I think, rightly—that the husband and wife were in fact living together, the woman can, under such circumstances, obtain an affiliation order against another man, assuming, of course, that that man is proved to be the father of the child. The section under which the application was made in terms relates to a "single woman," and primâ facie, therefore, this woman could not make such an application because she was not within that category; but there are a number of authorities by which we are bound which shew that the word "single" may be so far neglected as to warrant an application by a woman who has in fact been married, and who therefore has the status of a married woman, but who at the time the application is made is not living with her husband. We ought not, I think, to deviate from the plain words of an enactment further than we are obliged to do, nor ought we to create exceptions upon exceptions. So far as the decisions to which I have alluded are concerned, they are all cases in which at the time of the application the woman making it was in fact living separate from her husband, and in which the husband might have said that she had rendered herself unworthy of her husband's protection, and had lost her title to maintenance in his home, and therefore, as was said by Littledale J. in *Rex* v. *Flintan* (1), "she returns to the same state as if she were not married." The case of *Rex* v. *Luffe* (2) is a case of that character, since I

(1) (1830) 1 B. & Ad. 227, at p. 230; 35 R. R. 273.
(2) 8 East, 193; 9 R. R. 406.

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understand from the report that the applicant in that case was not living with her husband at the time of the application. The same is the case in *Reg.* v. *Collingwood* (1), as is plain both from the statement of facts and from the order obtained by the applicant. In delivering judgment in that case Lord Denman said (2): "The language of the statute applies in terms only to single women: so did the language of stat. 6 G. 2, c. 31; yet Lord Ellenborough and the whole Court, in *Rex* v. *Luffe* (3), held that an order might be made on the putative father of the bastard child of a married woman, who was to be considered single under the existing circumstances and for that purpose." The next case was *Ex parte Grimes* (4), and in that case also at the time of making the application the married woman was living apart from her husband. Lord Campbell in giving judgment said (5): "I think . . . . that in contemplation of law a married woman living separate from her husband may be within the meaning of the Act, which was passed for the purpose of providing for the support of the child." It is suggested that if the woman were living apart from her husband at the time of the conception of the child, that would be sufficient to enable her to be treated as a single woman under the Act, but no authority has been adduced for that proposition, and in *Stacey* v. *Lintell* (6) the Court seemed clearly of opinion that it was necessary that the woman should be living apart from her husband at the time of the application to enable the Court to regard her as a single woman.

Therefore, since there is no authority for it, I do not think that we ought further to extend the deviation that was sanctioned by *Rex* v. *Luffe* (3) from the primâ facie meaning of the words used in the section. No doubt, on the question of policy, there may be a case where a child is without the right to be supported either by its putative father or by the husband of its mother; but that seems to me to be a matter for the consideration of the Legislature, and not one by which our decision can be governed. On the whole, therefore, I come

(1) 12 Q. B. 681.
(2) 12 Q. B. at p. 686.
(3) 8 East, 193; 9 R. R. 406.
(4) (1853) 22 L. J. (M.C.) 153.
(5) 22 L. J. (M.C.) at p. 154.
(6) 4 Q. B. D. 291.

to the conclusion that the magistrates were right, and that this appeal must be dismissed.

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Appeal dismissed.

Solicitor for appellant: *J. T. Lewis, for D. P. James, Aberayron.*

Solicitor for respondent: *W. P. Owen, Aberystwith.*

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[IN THE COURT OF APPEAL.]

C. A.

1900

Nov. 20, 21; *Dec.* 3.

THE ATTORNEY-GENERAL *v.* THE JEWISH COLONIZATION ASSOCIATION.

Revenue—Estate Duty—Succession Duty—Disposition by Foreigner domiciled Abroad—Property situate Abroad—Disposition to English Company on Trusts enforceable by English Law—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2—*Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 7, 8, 16.

In 1892 a foreigner domiciled in Austria gave by a deed in the English language and form to an English company, constituted under the Companies Acts, and having its registered office in London, certain stocks, shares, and securities to a large amount upon the terms and conditions that the company would permit the donor to receive the income thereof during his life, and, after his death, would apply the same, and any investments substituted for them under the powers of the deed, for the benefit of Russian Jews generally, and principally for the promotion of the emigration of Russian Jews from Europe, and of their settlement in various countries outside Europe. The company had been formed to carry out the same objects, and at the time of the execution of the deed the various securities comprised therein were transferred to the company by the donor. The whole of the company's business was, under the articles of association, transacted by a council which sat at the principal office of the company in Paris. The ordinary and extraordinary general meetings of the company were held at their registered office in London, but formal business only was transacted there. In 1896 the donor, who was still domiciled in Austria, died. At that time the principal part of the securities subject to the deed were foreign securities situate abroad, and the documents of title thereto were abroad, a small proportion only of the property subject to the deed being in England.

Held (affirming the judgment of Ridley and Darling JJ.), that there was on the death of the donor a succession by the company within the meaning of s. 2 of the Succession Duty Act, 1853, and that therefore succession

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duty under that Act, and, consequently, estate duty under the Finance Act, 1894, were payable upon the principal value of all the property which was subject to the trusts of the deed of 1892 at the donor's death.

APPEAL from the judgment of a Divisional Court (Ridley and Darling JJ.) upon an information claiming estate and succession duty upon the death of Baron de Hirsch de Gereuth, a foreigner domiciled in Austria, on property in respect of which he had made a disposition in favour of the defendants, the Jewish Colonization Association.

The facts, which are set out in detail in the report of the case in the Court below (1), sufficiently appear from the head-note to render the arguments intelligible, and are stated more fully in the judgments.

1900. Nov. 20, 21. *Sir R. T. Reid, Q.C.*, and *Dicey, Q.C.* (*Swinfen Eady, Q.C.*, *Danckwerts, Q.C.*, and *E. Schuster* with them), for the defendants. No question arises as to a donation of 2,000,000*l.* which was given in the first instance by Baron de Hirsch to the defendants out and out. The question is as to the subsequent donation of 7,000,000*l.* which was subject to a trust in favour of the Baron for life. It is admitted that the duty is payable on such of the securities, forming part of that donation, as were locally situate in England at the time of the Baron's death. But it is contended that, with regard to the rest of the securities which were situate abroad at the time of his death, no duty is payable.

It is clear from the decisions that some limitation must be imposed upon the generality of the words used in s. 2 of the Succession Duty Act, 1853. The question is, What is that limitation? In the case of *Wallace* v. *Attorney-General* (2) Lord Cranworth L.C. states that the test is whether the person claiming becomes entitled by virtue of the laws of this country.

It is submitted, however, that the other decisions on the subject shew that this cannot of itself be the test, but that all the circumstances of the case must be looked at in order to see whether there is an English succession. But, taking the test

(1) [1900] 2 Q. B. 556. (2) (1865) L. R. 1 Ch. 1.

to be as stated by Lord Cranworth, in the present case the defendants' title does not depend on English law in the sense intended by him. It is true that the defendants are a joint stock company originally constituted under English law, but their title arises under a disposition made by a foreigner domiciled and resident principally abroad. Questions as to the capacity of the donor and the validity of the gift would be governed by the law of his domicil. For instance, if he had had children, then by the law of Austria those children would have certain rights in respect of his property, and a disposition of it, such as he made to the defendants, would, to the extent, if any, to which it was in derogation of those rights, be invalid. In the cases on this subject other than *Wallace* v. *Attorney-General* (1) the various circumstances of the case have been looked at, and the question has been whether, having regard to them as a whole, the succession must be considered to be an English one. On that question it is not enough for those contending that it is, merely to say that the settlement or other instrument creating the succession is English. The expression an "English settlement" is ambiguous. There are cases no doubt in which a marriage settlement of the ordinary English character concerns property situate abroad, or appoints a foreign trustee, and yet no one would doubt that it created an English succession: see *In re Cigala's Settlement Trusts* (2); and again there might be cases in which the form of the settlement was English, but the nature of the trusts might be such that it would not in substance be English. The domicil and residence of the settlor, the situation of the property, the place where the settlement was executed, its form, the character of the trusts, and possibly the domicil of the trustees, must all be considered. The character of the disposition as a whole must be looked at, and the proportion which the foreign and English elements of it bear to each other respectively must be estimated. Here the donor was a foreigner domiciled and generally resident abroad; the deed of settlement was executed abroad; the property comprised in it was mainly situate abroad; the council of administration of the defendant

(1) L. R. 1 Ch. 1. (2) (1878) 7 Ch. D. 351.

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company held its meetings and carried on its operations abroad; and the persons intended to be benefited were foreign. It is submitted that all these circumstances more than counterbalance the mere fact that the donor constituted a company under the English Companies Acts as the trustee for the purposes of his scheme, and consequently the deed declaring the trusts was naturally framed in the English language and form. Moreover, the property to which the deed of August 26, 1892, relates was effectually transferred to the defendants by means of the notices sent by the donor to his bankers abroad, and acted on by them, independently of the deed. The domicil of the defendant company was originally English no doubt, but the question whether it continues domiciled in England must be determined in accordance with the rule laid down in *Cesena Sulphur Co.* v. *Nicholson.* (1) In no case has it been held that the domicil of the successor is alone a sufficient test. Assuming that the deed must be taken to have created an English trust, that fact is not per se conclusive.

[They also cited *Thomson* v. *Advocate-General* (2); *In re Lovelace's Settlement* (3); *In re Wallop's Trusts* (4); *In re Badart's Trusts* (5); *Lyall* v. *Lyall.* (6)]

Sir R. B. Finlay, A.-G., and *Sir E. H. Carson S.-G.* (*Vaughan Hawkins* with them), for the Crown. The result of the authorities is that the question whether the duty is payable depends upon the real character of the settlement, upon whether it is really an English settlement or not. Here the donor called into existence an English company, constituted in accordance with and subject to English law, to be the trustee of the funds which he transferred for the purposes of his scheme. The trusts upon which the property is to be held by the company are declared by a deed in the English language and in English form, in which the donor is described as of his English address. By the terms of the company's memorandum of association, clauses 3 and 7, it is contemplated that the company may

(1) (1876) 1 Ex. D. 428.
(2) (1845) 12 Cl. & F. 1.
(3) (1859) 4 De G. & J. 340.
(4) (1864) 1 D. J. & S. 656.
(5) (1870) L. R. 10 Eq. 288.
(6) (1872) L. R. 15 Eq. 1.

become in certain events subject to the jurisdiction of the Charity Commissioners, and in the event of a winding-up, if any property remains, it is to be transferred to an institution with objects similar to those of the company, and, if no such institution is selected by the members, it is to be selected by the judge of the High Court of Justice having jurisdiction in that behalf. The inference to be drawn from all the circumstances is that the object of the donor was to provide for the establishment of an English institution for the purpose of carrying out his scheme and that the administration of the trust funds should be regulated by English law, and subject to the jurisdiction of an English Court. It has been suggested that the property passed independently of the deed, but, assuming that to be so, the defendants took on the terms of the deed, and the beneficiaries and the trusts for their benefit are ascertained by the deed. The fact that the deed was executed abroad is quite immaterial. The cases distinctly shew that the fact that the domicil of the settlor is foreign is not a test on the question whether the succession is English. The fact that to some extent the validity of the gift may depend on foreign law does not make the settlement any the less an English settlement. The same might be said of many English settlements which concern foreign property. By s. 16 of the Succession Duty Act, 1853, the defendants are accountable as successors. The decisions in *Wallace* v. *Attorney-General* (1) and *Attorney-General* v. *Campbell* (2) are distinct authorities in favour of the Crown. The donor having obviously intended to take the benefit of the English law for the purpose which he had in view, and to put the institution which he was founding under the protection of that law and of its administration by English Courts, the case is fairly brought within the provision of the Act by which succession duty is made payable in this country.

[They also cited *Attorney-General* v. *Felce*. (3)]

Sir R. T. Reid, Q.C., in reply.

Cur. adv. vult.

(1) L. R. 1 Ch. 1. (2) (1872) L. R. 5 H. L. 524.
(3) (1894) 10 Times L. R. 337.

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Dec. 3. A. L. SMITH M.R. read the following judgment:—In this case the Crown claims estate duty at 8 per cent. and succession duty at 10 per cent. (18 per cent. in all) upon a sum of 7,000,000*l.* of money, given by Baron de Hirsch in his lifetime, subject to a life interest therein, to the defendant company under the circumstances hereinafter mentioned; and the question is whether upon the death of the Baron, which took place upon April 21, 1896, a succession to property took place within the meaning of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 2, for if so, succession duty and also estate duty are payable on the 7,000,000*l.* as claimed by the Crown; because the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2, sub-s. 2, enacts that estate duty shall be payable upon property passing on the death of the deceased when such property is situate out of the United Kingdom (which was the position of the bulk of the 7,000,000*l.* in this case), if by the law in force before the passing of that Act legacy or succession duty was payable in respect thereof. It is said on behalf of the defendant company, the Jewish Colonization Association, that the facts relating to this money are such that the Succession Duty Act of 1853 has no application thereto, as this money was not "property" within the meaning of s. 2 of that Act.

The facts are these: In the year 1891 Baron de Hirsch, who was a domiciled Austrian, without children, and who had a permanent residence in Paris and a temporary residence in London, conceived the idea of ameliorating the condition of certain Jews, and for that purpose determined to make and did make in the first instance a donation of 2,000,000*l.* of money. To carry out his project he then brought out and formed in this country a limited company under the provisions of the Companies Act, 1862, which company was incorporated upon September 10, 1891, and registered under the name of the Jewish Colonization Association, which is the defendant in this information. The memorandum of this company shews in detail the object for which it was incorporated, and it sufficeth to state that the object was that it might hold and administer the donation of 2,000,000*l.* of money, which was then handed by the Baron to the company for the benefit of

Jews, and also might hold and administer any other donations it might receive towards promoting the welfare of the Jews. There is a clause in this memorandum, and it is the only one to which I will specifically refer—namely, the 7th—which provides that in the event of the company being wound up or dissolved, if any property then remained, it should not be distributed amongst the members of the company, but be transferred to some institution with objects similar to that of the company, and in default of selection of such an institution by the members, a judge of the High Court of Justice—that is, an English judge—should make the selection. The registered office of the company is now and always has been at the offices of Messrs. Tatham & Lousada, the English solicitors of the defendant company in the City of London, but it is stated that no part of the offices has been at any time in the possession or occupation of the defendant company. The defendant company had, besides its registered office, offices in Paris with branches at St. Petersburg and Buenos Ayres. All the general and extraordinary meetings of the company were held in London. By the articles of association the affairs and business of the company were to be under the general control of a council of administration, the meetings of which council were to be held at such places in Europe as the council should determine. The whole of the business of the company was always and still is transacted by the council in Paris. The books of the company (other than the register of members) were kept in the offices in Paris, St. Petersburg, and Buenos Ayres, according to French methods and in the French language, and the common seal of the company was kept at its principal offices in Paris. By the articles of association it was also provided that any notice to be given by the company to any member should be sufficient if posted in any of the European capitals addressed to such member at his registered place of address and advertised in *The Times* newspaper, and the company might in general meeting substitute some other English paper for *The Times*.

I stop here for a moment to inquire into the object which Baron de Hirsch had in view when, for the initiation and carrying out of his scheme to benefit the Jews, he formed and

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incorporated the company in England. That it is an English company I do not doubt, subject to English law, and the fact that there was a council of administration which carried on the business of the company outside of England does not, in my judgment, render the company any the less an English company and subject to English law. In my opinion there is but one answer to be given to the inquiry, which is, that the Baron had resort to an English corporation, which this company is, in order that his donation of 2,000,000*l.* of money might, if need be, be administered by English judges according to English law. In truth and in fact the Baron deliberately and intentionally submitted his scheme to English law, and indelibly stamped it as being an English scheme. These two millions of money having been given by the Baron absolutely to this English company for the benefit of the Jews, no question of succession arises thereon upon the death of the Baron, and these two millions consequently take no further part in this case.

In the next year—namely, in the year 1892—the Baron determined to increase his benefactions to the Jews, and he gave to this English company a further sum of 7,000,000*l.* of money for this purpose. The circumstances attending this further donation are these. By indenture dated August 26, 1892, and made "between Baron de Hirsch, of 82, Piccadilly, in the county of Middlesex, of the one part and the Jewish Colonization Association, having its registered office at 17, Old Broad Street, in the City of London, of the other part," after reciting that the Baron had agreed to give, and the association had agreed to accept the stocks, shares, bonds, and securities specified in the schedule thereto, subject to the conditions thereinafter expressed, and the same had been or would shortly be duly transferred and handed over to the association, it was witnessed, so far as material, as follows: (*a*) That the association during the life of the Baron would deal with the securities as directed by the Baron; (*b*) that the association would permit the Baron to receive and would pay to him the income of the investments, i.e., during his life; (*c*) that after the death of the Baron the association would apply the stocks, shares, and

securities subject to the provisions of the deed, for the benefit of Russian Jews. These securities form the 7,000,000*l.* now in question. At the date of the deed in August, 1892, as also at the time of the death of the Baron in April, 1896, they may be taken as consisting of about 1,000,000*l.* of securities in the London and Westminster Bank in this country and of about 6,000,000*l.* of securities in other banks outside of England. A list of the securities will be found in the schedule to the deed, and they are all securities upon foreign properties. On even date to that of the deed the Baron wrote to the respective bankers who then held the securities, instructing them to transfer them to the securities account of the Jewish Colonization Association; and this was done. After the execution of the deed the Baron during his life received the income of the moneys represented by the securities, and upon his death the question arises—Are these 7,000,000*l.* "property" within the Succession Duty Act, 1853? If they be, then it seems to me that the defendant company, although not beneficially entitled to the money, is bound to account to the Crown for succession duty by reason of ss. 16 and 44 of the Act of 1853, and, if so, also for estate duty.

It is not denied that, when Baron de Hirsch died, the 7,000,000*l.* was in the control of the English company. In my judgment the deed of August 26, 1892, is an English deed. It is in the English language, and executed according to the formalities of English law, and it conveys personal property, some of which was in England, to an English company. It is true that Baron de Hirsch, though describing himself in the deed as of No. 82, Piccadilly, in the county of Middlesex, executed it when he happened to be either in Paris or Ems, but this of itself makes it none the less an English deed. Moreover, the fact that a deed embraces foreign securities by no means makes the deed a foreign deed, for many English deeds do this. In my judgment it is not true to say upon the facts of this case that this deed is other than an English deed. It is a deed which for a purpose appointed English trustees subject to the English law, and any action brought to enforce the provisions of the deed would have to be brought in

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an English Court of justice. It is said, and truly said, on behalf of the defendant company that, although the words of s. 2 of the Succession Duty Act, 1853, are general—the words are, "every past or future disposition of 'property' . . . . shall be deemed to confer . . . . a succession"—yet these words are not to be read without some limit being placed thereon; for, as Lord Cranworth L.C. said in *Wallace* v. *Attorney-General* (1): "These words . . . . could not in reason extend to all persons, whether subjects of this country or foreigners, and wheresoever domiciled"; and that some limit is to be placed thereon is not disputed by the Attorney-General. The question is, What is that limit? I do not propose to go through the authorities in detail which have been produced and cited in argument, for in my opinion it will be found to have been satisfactorily done by my brothers Ridley and Darling in the Queen's Bench Division. In order to ascertain what the limit is I will cite the case of *Wallace* v. *Attorney-General* (2), in which Lord Cranworth in unmistakable terms lays down what the limit is. He says: "The only safe way of solving this question . . . . is to consider the duty as imposed only on those who claim title by virtue of our law. . . . Some limitation must be implied . . . . confining the operation of the words to persons who become entitled by virtue of the laws of this country." This, in my opinion, is precisely how the defendant company, upon the facts of this case, have become entitled to the 7,000,000*l.* upon the death of Baron de Hirsch.

Sir Robert Reid, for the defendant company, argued that the above was not now the true rule, and he said that to ascertain the limit all the circumstances of the case must be considered; and he said that was so because Sir George Jessel, in the case of *In re Cigala's Settlement* (3), and other judges had recapitulated and dealt with all the facts of the case before them when determining whether succession duty was payable or not. That very learned judge and other learned judges have done this, and, though they did go through the facts of the case, it was, as it seems to me, to adopt Lord Cranworth's

(1) L. R. 1 Ch. 1, at p. 6. (2) L. R. 1 Ch. 1, at pp. 8, 9.
(3) 7 Ch. D. 351.

rule, and not to overrule it, and Sir George Jessel pointedly says (1): "This is . . . . personal property in the hands of English trustees, and you cannot get it from them except by an action in England. That is the true test." If Sir Robert Reid is right in his contention, which I think he is not, and all the circumstances are to be considered and this is the rule, then Sir Robert Reid would not, in my opinion, get out of the difficulty he is in any more than if Lord Cranworth's rule applied, which I think it does, for I have no doubt that from first to last the scheme of the Baron was essentially and solely an English scheme to be governed from first to last by English law. The 7,000,000*l.* of money is therefore property within the Succession Duty Act, 1853.

Sir Robert Reid further argued that, if there had been children of the Baron's, inasmuch as by Austrian law an Austrian father cannot divest himself of property so as to impair the rights of his children to "legitim," and any alienation at any time having that effect may on the death of the father be set aside, to the extent to which it has that effect, Austrian and not English law governed the case. I do not agree. The trust and the administration of the trust can only be enforced or the trust got rid of by having resort to English law—i.e., to an English Court of justice. Till that has been done the English company is entitled to hold the 7,000,000*l.*, subject, of course, to the trusts in favour of the Jews. In any proceedings to set aside the trust evidence of what is the Austrian law as regards the father's rights might, I think, be given to shew that the trust was non-effective; but this question would have to be decided by an English Court before the company could be deprived of its money. For the reasons above, in my judgment the appeal must be dismissed.

COLLINS L.J. read the following judgment:—Notwithstanding the very able argument for the appellants, I cannot bring myself to entertain a doubt that the view of the Crown and of the Court below must prevail. We are not troubled in this case with questions which arise upon the death of a

(1) 7 Ch. D. 354.

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domiciled foreigner, testate or intestate, as to property which is the subject of the proceedings. When Baron de Hirsch died in 1896, the property, in respect of which the Crown allege that succession duty is payable, was vested, not in him, but in the English company which he had called into existence. By a deed executed in his lifetime in 1892 between himself and the company, after reciting that he had agreed to give, and the company to accept, the property in question, consisting of certain shares, stocks, and securities therein set out on certain conditions, and that the same had been, or would shortly be, transferred to the company, the latter had declared and covenanted with him that it would permit him to receive the income of the said stocks, &c., for life, and, after his death, apply the corpus for a charitable purpose therein defined. If the property in question were English, there would, therefore, clearly be a succession, in respect of which, under ss. 2 and 16 of the Act of 1853, the company would be bound to pay the duty. That the company was in possession of the property at the time of his death is, I think, quite clear. The securities of which it consisted were held by different banks in England, and elsewhere in Europe, who, by the orders of the deceased, given on the same day on which the deed was executed, had transferred them from his account to that of the company, for whom they thenceforth continued to hold them, honouring cheques drawn by the company on them for the interest received thereon. The property in question, therefore, formed no part of the estate of the deceased, and no presumption, therefore, arises as to its locality, such as might have arisen by virtue of the doctrine "Mobilia sequuntur personam," had it done so. He had parted in his lifetime with the entire legal estate in it, and his beneficial interest ceased upon his death. We begin the discussion then with the property in the hands of an English trustee, and it seems to me that the presumption is that it is English, and the burden lies on those who say it is not. It was contended indeed by Sir R. Reid, but I think somewhat faintly, that the company was not really an English company, having regard to the nature of its business, the place where the meetings of its council were held, and also some

peculiarities in its constitution. But I think it is clear beyond possibility of doubt that the company was not only in name but in fact an English company, deliberately created as such by its founder. It is not necessary to refer in detail to the points in its memorandum and articles, which are set out in the information, and which were emphasized by the Attorney-General, which evidence, not merely an implied, but an express intention to bring it under the jurisdiction of the English law. The appellants therefore are confronted with the presumption arising from the fact that the legal owner of the property at the date of the Baron's death was not foreign, but English. If then they are to establish that it is, nevertheless, still foreign, they must fall further back, and shew that the foreign donor, in vesting his property in the English trustee, nevertheless intended to preserve its foreign locality, that is, that it should continue to follow the person, not of the new owner, but of the original donor. I have said that I think the presumption is against such a contention, but, even if it were not, I think the facts shew conclusively that nothing could have been further from the intention of the donor. Having called into existence a company to which, having the whole world open to choose from, he had deliberately given an English nationality for the purpose of making it the instrument for carrying out his scheme, he began by handing it over personal property to the value of about 2,000,000*l.* sterling out and out; and he shewed that he contemplated that in certain events his main scheme might become impracticable, and provided for the substitution of another at the discretion of an English judge. Could it be contended that he did not intend to stamp on the property comprised in this his first gift the character of English property subject to English law? It is, of course, quite immaterial where the property, being movable, was actually situate: it followed the person of its owner; but the company were empowered to vary the investments, and might, had it chosen, have placed it all in English securities. It seems to me impossible to contend that this sum of 2,000,000*l.* continued to follow the domicil of the donor. But, if so, why are we to conclude that there was a different intention in the

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case of the property in question? The transfer was between the same parties, and for a special branch of the primary general purpose, after the life of the donor, and was carried out by a deed in English form in the English language, though executed in Paris. I regard the case of *Attorney-General* v. *Campbell* (1) as a conclusive authority in favour of the Crown. Indeed, the present case is much simpler, as the property in question had not, as there, to be got in under the will of a foreigner before the trust which was held to let in the operation of the English law became effective. It was, as I have already pointed out, in the actual possession of the English trustee at the date of the Baron's death. I think this case also falls within the principle of *In re Cigala's Settlement Trusts* (2), though I think the facts here ground a more obvious inference that it was the intention of the settlor to place the fund under the jurisdiction of the English law. There the inference drawn was that the settlor, an English lady, domiciled in England but about to marry a domiciled Italian, desired to preserve the jurisdiction of English law over the settled property, although the beneficiaries would presumably be persons with a foreign domicil. In this case the inference, as pointed out by the Solicitor-General, of intent on the part of the Baron to substitute the law of another country for that of his domicil is irresistible, when we find him, not merely not choosing an individual of his own domicil, but going out of his way to call into being a persona incapable of existence except as a creature of English law, and then by an instrument, not in his own language, but in English and in English form, making it the trustee for carrying out his purpose with regard to the property entrusted to it. Whether, therefore, the test be that the appellants become entitled to the succession by virtue of English law, as stated by Lord Cranworth in *Wallace* v. *Attorney-General* (3), or that the intention that the property is to be brought under the protection of the English law must be gathered from all the circumstances, or, what is probably only another way of arriving at the same result, that the property

(1) L. R. 5 H. L. 524. (2) 7 Ch. D. 351.
(3) L. R. 1 Ch. 1.

in question must have an English character, as Lord Westbury called it in *Attorney-General* v. *Campbell* (1), stamped upon it, I think the succession here falls within the Act, as interpreted and limited by the decisions referred to in the argument. I think the principle at the bottom of these tests is really the same, and whether we arrive at the conclusion that it has become English property because an indelible incident of English property is stamped upon it, namely, that the rights thereto shall be ascertained by English law, or conclude that, being English, it is therefore subject to our law, the result is the same, and in either view it is quite immaterial where the property is physically situated, and such I think is the effect of the authorities. Sir R. Reid contended that the right to the succession here was created, not by the trust deed, but by what was done abroad before it was in fact executed, and he relied on the notices sent by Baron de Hirsch to the banks, and the minute of July 22, 1892, as establishing this view, his object being to displace Lord Cranworth's test. But, even if this were the case, the trust created would by the terms of the minute itself be that of the draft deed therein referred to, and the rights of the parties would therefore be regulated by it. He also contended that it must depend on foreign law whether the property, the subject of the trust, could ever be brought under it. If the property had not been got in, I think this difficulty might possibly arise, and to the extent, if any, that the property could not be got in, the succession might be defeated, but for the reasons I have given I think the point does not arise.

STIRLING L.J. read the following judgment:—It is unnecessary in this case to state the facts in detail. It seems right however to say that it was admitted (and properly admitted) at the bar that, by virtue of directions given by Baron de Hirsch about August 26, 1892, there was conferred on the defendants a complete legal title to securities of the estimated value of 7,000,000*l.* sterling, which were locally situate partly in this country and partly abroad. As from August 26, 1892, these

(1) L. R. 5 H. L. 524.

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securities have been held by the defendants upon the terms of an instrument of that date under which Baron de Hirsch took a beneficial interest during his life. The substantial question to be determined is whether, upon the death of Baron de Hirsch, which occurred on April 21, 1896, the securities so held by the defendants became subject to the payment of succession duty under the Succession Duty Act of 1853. It was not disputed that, if the Succession Duty Act of 1853 applies to this case, the death of Baron de Hirsch was an event upon which, by the operation of ss. 2, 16, and 44, succession duty became payable by the defendants.

It seems unnecessary to decide a question which was mooted, but not very fully discussed, namely, whether the defendants are to be regarded as themselves "successors" within the meaning of the Act, or only as trustees accountable under ss. 16 and 44 for the payment of the duty.

The language of s. 2 of the Act of 1853 is sufficiently wide, if read literally, to impose on the defendants the duty claimed; but it is said, and with truth, that the cases shew that some limitation must be imposed on the generality of the words employed. The question is whether the limitation is such as to free the defendants from liability to duty.

In the first case in which this question arose, namely, *In re Lovelace's Settlement* (1), it appears to have been contended that the operation of the Act was limited to settlements made by settlors domiciled within the United Kingdom, by analogy to the rule laid down in *Thomson* v. *Advocate-General* (2), with respect to liability to legacy duty. It was, however, pointed out by Turner L.J. in that case, and also in *In re Wallop's Trusts* (3), that such a rule was inapplicable to the Succession Duty Act. The contention was overruled, and foreign domicil has never since been regarded as the sole test applicable in every case of liability for exemption to succession duty.

The question came next to be considered in *Wallace* v. *Attorney-General* (4), where it was decided that succession duty is not payable on legacies given by the will of a person domi-

(1) 4 De G. & J. 340.
(2) 12 Cl. & F. 1.
(3) 1 D. J. & S. 656.
(4) L. R. 1 Ch. 1.

ciled in a foreign country. This decision does not govern the present case, for the title of the defendants and the beneficiaries, whoever they may be, under the instrument of August 26, 1892, is not derived under a will or testamentary instrument of any kind, but under an act or acts inter vivos. The case, however, is important by reason of it being laid down by Lord Cranworth L.C. that the limitation on the language of s. 2 of the Act of 1853 must be one "confining the operation of the words to persons who become entitled by virtue of the laws of this country." At the close of his judgment Lord Cranworth distinguishes the case before him from *In re Lovelace's Settlement* (1) and *In re Wallop's Trusts* (2) by saying, "They were both cases of testamentary appointment under English instruments, not of wills; and such an instrument must necessarily be construed by our own laws, not by that of the domicil of the person executing the power." From this it may perhaps be inferred that Lord Cranworth would have considered a person claiming under an instrument which had to be construed by the law of a foreign country as not claiming under the law of England.

The next case of importance is *Attorney-General* v. *Campbell*. (3) There a testator domiciled in Portugal made in England and in the English language and form a will by which he appointed four executors, three of whom were resident in London, and directed them to collect his personal estate, the bulk of which was locally situate in Portugal, and convert it into cash, and invest the residue, after payment of debts and legacies, in the English funds, and to hold the investment upon trust to pay certain annuities (one of which he gave to his sister), and directed them for this purpose to appropriate and set apart in their names such an amount of Consols as they should think fit; and further that, when the annuity in respect of which an appropriation was made should cease, the amount appropriated should revert to and become part of his residuary estate, and be in trust for his son and daughters who resided in Portugal. The testator's sister died in 1870, and thereupon the

(1) 4 De G. & J. 340. (2) 1 D. J. & S. 656.
(3) L. R. 5 H. L. 524.

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Crown claimed succession duty. Lord Romilly M.R. held that duty was not payable, but his decision was reversed by the House of Lords. The ratio decidendi is thus stated by Lord Westbury: "If a man dies domiciled abroad possessed of personal property, the question of whether he has died testate or intestate, and also all questions relating to the distribution and administration of his personal estate, belong to the judge of the domicil, and that on the principle of 'Mobilia sequuntur personam.' His domicil sets up the forum of administration. Now, apply that to the present case. The legatees would resort to that forum to receive their legacies, and the executors and trustees, when the residue has been ascertained, would resort to that forum to receive it. When they have received it, the legacy is discharged, and all things that are incidental to the legacy cease. They receive it bound with the duty of bringing it to this country, and investing it here in Consols, which they are directed to hold upon certain trusts mentioned by the will. But the character of the ownership is no longer that of a legacy. The character of the ownership is under the trusts directed to be created by the will. There is, therefore, a settlement made of the property which is brought into this country and invested here in such mode of investment as gives to the property whilst it remains here the character of English property in respect of locality. That settlement, so made, undoubtedly becomes subject to the rules of English law under which it is held, by virtue of which it is enjoyed, and under which it will be ultimately administered. That, therefore, is a description of ownership which falls immediately within the provisions of the Succession Duty Act. There can be no doubt that, when a partial interest created by one of the trusts so directed to attach upon the residue after it has been received and invested, and when all the purposes of the administration have been answered—when such a partial interest, I say, ceases, and the interest next in order comes into being, succession duty attaches upon that devolution of property." A similar view was taken by Lord Hatherley L.C. who also advised the House. The most important elements relied on appear to be that the testator, though domiciled abroad, directed a certain portion of

his property to be brought within the jurisdiction of this country, and retained here upon trusts the proper forum for the administration of which was an English Court.

The last case which requires notice is that of *In re Cigala's Settlement Trusts*. (1) There, on the marriage of an English lady with a domiciled Italian, French Rentes, shares in the Bank of France, and English Government securities were transferred to four trustees, three of whom were English and the fourth an Italian, on the ordinary trusts of an English marriage settlement. The husband and wife lived in Italy; and, on the death of the survivor, the persons entitled under the settlement were two children of the marriage, who were domiciled Italians. The Italian trustee had died, and the trust funds stood in the names of the English trustees. Sir G. Jessel M.R. held that succession duty was payable, saying (2): "The settlement then being a British settlement, the trustees being subject to British jurisdiction, the forum for deciding upon the claim" (i.e. of the children of the marriage) "being a British Court, and the property being in fact English property, it appears to me that this is property coming within the 2nd section of the Act." The decision in *Attorney-General* v. *Campbell* (3) is binding on this Court; that in *In re Cigala's Settlement Trusts* (1) is not binding, but is nevertheless a decision of great weight. It has moreover been followed by a Divisional Court in *Attorney-General* v. *Felce*. (4)

The case of *Attorney-General* v. *Campbell* (3) appears to me to shew that one contention put forward on behalf of the defendants is unfounded. This was based on the rule laid down by Lord Cranworth that the operation of the Act of 1853 is to be confined to persons who become entitled by the law of this country. It was sought to treat that rule as referring to the law of this country *exclusively*: so that, if the law of another country had to be considered for any purpose, as for example to ascertain the capacity of the settlor or the validity of his acts, it was to be taken as established that duty was not payable. If the rule laid down by Lord Cranworth is so

(1) 7 Ch. D. 351.
(2) 7 Ch. D. 351, at p. 357.
(3) L. R. 5 H. L. 524.
(4) 10 Times L. R. 337.

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understood, then it seems inconsistent with the decision in *Attorney-General* v. *Campbell* (1), for in that case the law of the testator's domicil had to be regarded for the purpose of ascertaining his testamentary capacity and the validity of his bequest. Even as regards the interpretation of such a will it is the general rule that "a will of movables is to be interpreted with reference to the law of the testator's domicil at the time when the will is made": though there is an exception, namely, that, "where a will is expressed in the technical terms of the law of a country where the testator is not domiciled, the will should be construed with reference to the law of that country." See Dicey, Conflict of Laws, p. 695. It may be, though it is not expressly stated, that the will in *Attorney-General* v. *Campbell* (1) was regarded as falling within this exception. However this may be, it was held that the operation of the law of the domicil was exhausted when the executors and trustees of the will obtained possession of the legacy, and held it upon the trusts declared by the will. Lord Cranworth's rule, therefore, if it is to be treated as now binding, must be taken to be satisfied, where property is found to be legally vested in a person subject to the jurisdiction of English Courts, and the title to the beneficial interest in that property is regulated and capable of being enforced by the laws of England, even although the operation of the instrument creating that title may to some extent be governed by foreign law. It is however to be remarked that of all the judges who have dealt with the question Lord Cranworth alone has formulated any general principle to govern all cases; the others, Turner L.J., Lord Westbury, Lord Hatherley, and Sir G. Jessel, are content to deal with each case on its special circumstances, and to determine whether the particular disposition under consideration is fairly within the purview of the Act; and not one of them has expressly adopted the rule laid down by Lord Cranworth. In each such case certain special circumstances have been pointed out as the basis of the conclusion which was arrived at; but it has nowhere been said that all or any of the circumstances relied on are essential, or that, where another and new set of circum-

(1) L. R. 5 H. L. 524.

stances is found to exist, the Court which has to deal with that particular case may not proceed to treat it after the same fashion as the eminent judges whom I have last named, and investigate de novo whether or not it is fairly brought within the enactment.

Now the facts of the present case are very remarkable. Baron de Hirsch, being a domiciled Austrian, chiefly resident in Paris, but having also a residence in London, brought the defendant company into existence under the provisions of the English Joint Stock Companies Acts. The memorandum of association contains provisions which shew that the framer of it contemplated that the company would be subject to the jurisdiction of the ordinary English Courts, and might in certain events become subject to the jurisdiction of the Charity Commissioners. The defendant company thus constituted is to all intents and purposes an English company. This being done, the Baron proceeded at a later date to transfer to the defendants funds of large amount upon the terms of the document of August 26, 1892. This document is in the English language, and was prepared by the legal advisers of the defendant company, namely English solicitors. It is under seal, and is expressed in terms well known in English law. For example it commences with the familiar words "This indenture." "Indenture" is a term peculiar to the law of this country, and of countries whose law is based on that of England (as for example Ireland, some English colonies, and some of the United States of America), and would not be intelligible to a lawyer instructed only in the law of most Continental countries. The parties are described, one as of an address in London, and the other as having its registered office there. The deed is based on the assumption that the valuable securities described in the schedule had been or would be duly transferred and handed over to the defendants: and, as I have said, it is admitted that those securities were so transferred or handed over, so that a complete and effectual gift was made of them by the Baron de Hirsch to the defendants. The deed provides that Baron de Hirsch is to have the income of the funds during his life and that, after his death, the defendants will apply these

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funds for the benefit of Russian Jews; and that separate accounts of these funds are to be kept. It is also provided "that, on the death of the donor, they" the defendants "shall retain so much of the property as shall be then held by them for their own exclusive benefit, subject to their accounting to the executors or assigns of the donor for the arrears of income down to his death." There is found therefore, first of all, this circumstance, that large funds are placed under the legal control of an English corporation created by the donor of the funds for the purpose (amongst others) of accepting and administering such gifts. Being an English corporation it is necessarily under the jurisdiction of English Courts, and, while it may acquire a foreign residence and domicil so as to be capable of being sued in a foreign country, it must, I apprehend, be capable, as long as it exists, of being sued in the country of its origin. On this I may refer to ss. 39 and 62 of the Companies Act, 1862, which contain provisions which enable the company to be served with process in England: Order IX., r. 8. I may add that in the present case there appears to be no sufficient evidence that the defendants ever acquired a foreign domicil. Secondly, the title to the beneficial interest in these funds is governed by the deed of August 26, 1892. It appears to me that this is an English instrument intended to be interpreted and to take effect in accordance with English law. The deed is at least as much an English instrument as was the will of the Portuguese testator adjudicated upon by the House of Lords in *Attorney-General* v. *Campbell*. (1) I have already pointed out that a will expressed in the technical terms of the law of a country where the testator is not domiciled is to be construed with reference to the law of that country; and in this case a similar rule may properly be applied to a deed. The property to which the deed relates was locally situate in many countries; it cannot have been intended that the law of each of those countries should apply. The law applicable must, as it seems to me, either be that of England, or of France where the Baron de Hirsch chiefly resided, or of Austria where he was domiciled.

(1) L. R. 5 H. L. 524.

If it was intended that the law of France or Austria should govern, why was not the instrument of August 26, 1892, expressed in the appropriate language and legal form? Why on the other hand was it expressed in the English language, and in a distinctive legal form peculiar to English law? I can see no reasonable answer to these questions except that English law was intended to govern. Now the defendants must be regarded either as the owners of these funds or as trustees for the benefit of Russian Jews. If the former alternative be adopted, then the funds are the property of an English corporation, and consequently English property on the principle of "Mobilia sequuntur personam." If the second alternative be correct, the only mode in which the due and complete administration of the trusts of these funds can be enforced appears to be by proceedings at the instance of the Attorney-General in the Courts of this country; or in other words an English Court is the proper forum of administration. If then the rule laid down by Lord Cranworth is to be applied in the sense in which I understand it, I think that in this case there exists property under the legal control of an English corporation, subject to the jurisdiction of English Courts, and that the title to the beneficial interests in that property is to be regulated and enforced by English law. If on the other hand the whole circumstances of the case are to be looked at, those relied on by the learned counsel for the defendants must be taken into consideration. These were, mainly, the following: (1.) that the original donor of the funds as to which the question arises was domiciled and chiefly resident abroad; (2.) that the deed of August 26, 1892, was executed by him abroad; (3.) that the property which forms the subject-matter of that deed was, to a great extent, locally situate abroad; (4.) that the council of administration of the defendants held its meetings and carried on its operations in Paris; and (5.) that the persons intended to be benefited were foreigners. As to the first, it seems to me that the effect of the domicil of the donor was exhausted when, as is admitted, the funds were placed under the legal control of the defendants. As to the second, it does not seem to me to be one to which any great weight can reasonably be attached,

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regard being had to the other circumstances in evidence as to the preparation and execution of the deed. As to the third and fourth, it is to be borne in mind that the defendants cannot escape from the jurisdiction of the English Courts by continuing or selecting investments which may be locally situate out of the jurisdiction, or by carrying on operations in a place without the jurisdiction. As to the fifth, I see no way in which the rights of the beneficiaries, whether native or foreign, can be completely enforced except through the intervention of Her Majesty's Attorney-General, or, it may be, the Charity Commissioners. Weighing all these circumstances as best I can, I think that there is nevertheless a strong preponderance in favour of the view that, inasmuch as the settlement in question is an English settlement, the property in question is under the legal control of an English corporation, and the proper forum for the administration of the trusts relating to the property is an English Court, the case is fairly brought within the purview of the Succession Duty Act, 1853. For these reasons the judgment of the Divisional Court ought in my opinion to be affirmed.

Appeal dismissed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendants: *Tatham & Lousada.*

E. L.

MONTGOMERY & CO. *v.* THE INDEMNITY MUTUAL MARINE INSURANCE COMPANY, LIMITED.

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Nov. 14, 19.

Insurance, Marine—General Average—Assured Owner both of Ship and Cargo —Liability of Underwriters.

A loss caused by the cutting away of a ship's mast for the safety of the whole adventure is a general average loss for which the underwriter of a policy of insurance on cargo against perils of the seas is liable although the assured is the owner both of ship and cargo, and, as between those interests, there is in fact no contribution to general average.

Judgment of Gorell Barnes J. in *The Brigella*, [1893] P. 189, not followed.

COMMERCIAL CAUSE, tried before Mathew J.

The action was brought under a policy of marine insurance, subscribed by the defendants, at and from any ports or places on the West Coast of South America to any port of call $\frac{\text{and}}{\text{or}}$ discharge in the United Kingdom, on a cargo of nitrate on board the ship *Airlie*.

The insurance was against perils of the seas and other losses of the same character, and the policy contained the usual sue and labour clause.

The plaintiffs were the owners both of ship and cargo, and they claimed under the policy to recover a general average loss incurred by the cutting away of the ship's mainmast and rigging.

The following statement of the facts given in evidence at the trial is taken from the judgment of Mathew J. :—

The ship sailed, on March 29, 1900, with a cargo of nitrate from Tocopilla, a port on the West Coast of South America, for Shields.

On May 17, while in the latitude of the river Plate, the vessel encountered very bad weather, with a heavy cross-sea, and began to roll and lurch violently. About 9 a.m. it was noticed that the mainmast, which was an iron mast, and hollow, had settled down. The rigging, which had slackened, was at once tightened by a process called "swiftering up," and the mast,

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so secured, remained firm in position. The ship continued to roll, and the master, after some time, fearing that the mast would break and fall on the deck and cause the loss of the vessel, thought it best to get rid of it. Accordingly, the vessel was brought into position; the windward rigging was cut, and the mast fell on the side, carrying away portions of the other masts and rigging. The wreckage was promptly cut adrift. The vessel was brought home under jury rig, and reached her port of discharge in safety. It was found, when the cargo was discharged, that the mast had been in no greater peril than the rest of the adventure. It had broken across about 12 inches from the keelson. The upper portion had crushed into the lower in telescope fashion, and rested firmly and securely on the keelson.

Carver, Q.C., and *J. A. Hamilton*, for the plaintiffs. The points for the defence are, first, that on the facts of this case there was no general average sacrifice for the safety of the adventure, because when the mast was cut away it was already in a condition of wreck; and, next, that the defendants are not liable because the plaintiffs were owners both of ship and cargo, and there could be no general average because there could be no contribution.

As to the first point, the evidence shews that the mast was cut away for the safety of the adventure. It was not in such a condition of wreck as would satisfy the tests stated in *Shepherd* v. *Kottgen* (1) and *Iredale and Porter* v. *China Traders' Insurance Co., Limited.* (2) The fact that the mast was in fact safe makes no difference; it is sufficient if the master reasonably thought it endangered the safety of the ship, and cut it away in consequence of his belief.

On the other point, there was a sacrifice here giving rise to general average within the definition of that term in *Birkley* v. *Presgrave* (3) and Arnould's Marine Insurance, 2nd ed. p. 895. There was a sacrifice of the mast for the common good, and for the safety and preservation of the whole adventure. In such

(1) (1877) 2 C. P. D. 578.
(2) (1899) 4 Com. Cas. 256.
(3) (1801) 1 East, 220, judgment of Lawrence J. at p. 229; 6 R. R. 256.

a case underwriters, who stand in the place of the assured, are liable to bear the proportion of the loss falling on the interest insured by them, irrespective of the ownership of the different interests—ship, freight, and cargo. The judgment of Gorell Barnes J. in *The Brigella* (1) ought not to be followed. It was not necessary for the learned judge to decide this point, because on the facts of that case there had been no sacrifice. The learned judge was wrong in thinking that, where the assured has incurred expenditure in averting a loss of other interests, the right to recover such expenditure from the underwriters is under the sue and labour clause in the policy. The underwriters are directly liable to contribute to general average under the maritime law: *Aitchison* v. *Lohre*. (2) Against the judgment in *The Brigella* (1) may be set the opinion of Blackburn J. in *Oppenheim* v. *Fry* (3); the two American cases—*Potter* v. *Ocean Insurance Co.* (4) and *Greely* v. *Tremont Insurance Co.* (5)—and the opinion of text-book writers: Emerigon, c. 12, s. 39; Phillips on Insurance, ss. 1274, 1412; Benecke on Marine Insurance, p. 473. The practice of average staters, both before and since *The Brigella* (1) was decided, has been to adjust general average irrespective of whether or not the different interests were owned by the same person; and, as the evidence shewed in the present case, underwriters have been in the habit of paying on their adjustments.

Joseph Walton, Q.C., and *Loehnis*, for the defendants. First, the evidence shewed that the mast was a wreck, and was dealt with as such by the master of the *Airlie*. He cut the rigging to get rid of it in a particular way. It is no answer to say that in fact the mast was safe. The same inference should be drawn as in *Shepherd* v. *Kottgen*. (6)

Secondly, this was not a general but a particular average loss. There can be no claim for a general average loss against underwriters on cargo where both ship and cargo belong to the same owner, because there can be no contribution between the

(1) [1893] P. 189.
(2) (1879) 4 App. Cas. 755, Lord Blackburn at pp. 764, 765.
(3) (1863) 3 B. & S. 873, at p. 884.
(4) (1837) 3 Summer, 27.
(5) (1852) 9 Cushing, 415.
(6) 2 C. P. D. 578.

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two interests. The judgment of Gorell Barnes J. in *The Brigella* (1) was right, and concludes this case. A general average loss cannot be recovered under the sue and labour clause: *Aitchison* v. *Lohre*. (2) The sacrifice here is a sacrifice which would be the subject of general average if there could be contribution by the different interests. It is a direct loss, and is not within the sue and labour clause. But where all the interests are insured by one policy an expenditure incurred in averting a loss of those interests through a peril insured against would fall to be borne by the underwriter under the sue and labour clause: *The Brigella* (3), per Gorell Barnes J. —and that may be the explanation of the decisions in the American cases which were cited for the plaintiffs.

[They also referred to *Kidstone* v. *Empire Marine Insurance Co.* (4), *Xenos* v. *Fox* (5), and *Dickinson* v. *Jardine*. (6)]

Carver, Q.C., replied.

Cur. adv. vult.

Nov. 19. The following judgment was read by

MATHEW J. This was an action on a policy on the cargo of the ship *Airlie* to recover a general average loss incurred by the cutting away of a mast. [The learned judge then stated the facts as previously set out.] The first point made by the defendants was that there was no general average sacrifice. The mast, it was said, was already hopelessly lost, and therefore was not sacrificed for the safety of crew, ship and cargo. But I cannot agree with this contention. The mast was not in such a condition that it must have been lost whether the rest of the adventure had been saved or not. It could not be said that the mast had no value, or that it was impossible to be saved. There was a chance of saving it, and that chance was thrown away for the safety of the whole adventure. The master would seem to have exercised his judgment reasonably, and it was not necessary that his view should be borne out by the facts when

(1) [1893] P. 189.
(2) 4 App. Cas. 755, Lord Blackburn at pp. 764, 765.
(3) [1893] P. 189, at p. 196.
(4) (1866) L. R. 1 C. P. 535.
(5) (1868) L. R. 3 C. P. 630.
(6) (1868) L. R. 3 C. P. 639.

they came to be afterwards examined. For the defendants reliance was placed on the case of *Shepherd* v. *Kottgen* (1), where the mast was cut away, but was held to have been already lost. There it appeared that the rigging had been loosened in the storm, and that all that was done was to anticipate by a few minutes an inevitable loss. The mast of the *Airlie* before the rigging was cut was firmly upheld, and could have stood and been saved if the master had not ordered it to be cut away. Upon the question of fact I am of opinion that there was a general average sacrifice.

But the underwriters relied upon another defence, which raises a question of great importance. It was said that the loss of the mast did not give rise to a general average claim because the ship and cargo both belonged to the plaintiffs; and, as there could be no contribution in fact, there was no general average loss. The defendants relied on the case of *The Brigella* (2), which was said to be a judgment in favour of their contention. It was pointed out, however, that the opinion of the learned judge was not necessary to his decision, and I was asked to hear the case argued and give my judgment on the matter. I feel compelled to do so, though I have great reluctance to express an opinion on the matter which differs from that of Gorell Barnes J. The duty has been probably imposed upon me in order that, if the case should go further, it may be more readily dealt with when the different views which have been held on the subject have been formally stated. It seems to me that a general average act is not affected by the consideration whether there will be a contribution or not. The sacrifice is made for the safety of those on board as well as of the ship and cargo. But there is no contribution from those whose lives have been saved. Further, in such a case it has never been held, or, so far as I know, argued that as between ship and freight there is no distribution of loss among the respective underwriters because both interests belong to the shipowner. It was not disputed that in the case of general average expenditure—as, for instance, the hire of a tug to extricate a ship

(1) 2 C. P. D. 578.

(2) [1893] P. 189.

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from a dangerous position—there was a right to demand contribution from underwriters. The explanation offered on behalf of the defendants was that such expenditure was recoverable under the sue, labour and travel clause. But that clause, it seems to me, stands clear of the insurance against general average sacrifice. Its object is explained by Lord Blackburn in *Aitchison* v. *Lohre*. (1) It was not intended that the clause should afford an additional remedy for what was already sufficiently protected. Again, what is sacrificed in general average ought, in my judgment, to be treated in principle as lost by the peril averted. In the present case the loss of the mast must be regarded as a loss by perils of the seas—a loss not altered in its character by reason of a voluntary act intended to prevent more disastrous consequences. Accordingly, it has been held that a loss by general average cannot be added to a loss to the full amount insured, so as to cast a further liability on the underwriter: see *Aitchison* v. *Lohre*. (1) One further consequence of the supposed rule would be that in a case of joint ownership a jettison of cargo would leave the underwriter on cargo liable for the whole amount, without any right of contribution; and the concealment of the fact that the owner of goods was also the owner of ship might be treated as an objection to the insurance on the ground of the concealment of a material fact. Here the policy of insurance is a policy against general average due to perils of the seas, and other losses of the same character; and, if there were any question as to whether this loss was covered as general average, it is certainly a loss of the same character. Although the point has not been dealt with in any other case than that of *The Brigella* (2), there is considerable authority for saying that the liability of the underwriter is not affected where insured interests are joint: *Oppenheim* v. *Fry* (3), per Blackburn J.; the two American cases—*Potter* v. *Ocean Insurance Co.* (4) and *Greely* v. *Tremont Insurance Co.* (5); Phillips, ss. 1274 and 1412. A man of business desirous of keeping a strict account of his transactions

(1) 4 App. Cas. at p. 765.
(2) [1893] P. 189.
(3) 3 B. & S. 873.
(4) 3 Summer, 27.
(5) 9 Cushing, 415.

would allocate such a loss as this to his interest in ship and cargo in proportion to their respective values. There seems no reason why his underwriter should not be placed in the same position.

It was agreed that the figures should be settled between the parties when the question of principle was determined. I give judgment for the plaintiffs, with costs.

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Judgment for the plaintiffs.

Solicitors for plaintiffs: *William A. Crump & Son.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

W. A.

[IN THE COURT OF APPEAL.]

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Nov. 22.

THE GRESHAM LIFE ASSURANCE SOCIETY, LIMITED, APPELLANTS; BISHOP (SURVEYOR OF TAXES), RESPONDENT.

Revenue—Income Tax—Company—Profits or Gains—Interest from Foreign Investments—Receipt in the United Kingdom—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 100, *Sched. D., Fourth Case—Income Tax Act,* 1853 (16 *&* 17 *Vict. c.* 34), *s.* 2, *Sched. D.*

An insurance society carried on their business in the United Kingdom, and, by means of local agents or managers, in foreign countries. The business was entire and indivisible, and was managed by a board of directors in London. The society possessed funds invested in foreign countries in which they did no business. The interest on these investments was either reinvested in those countries, remitted directly to other foreign countries for investment, or remitted to London. They also possessed funds invested in foreign countries in which they carried on business. The interest on these investments was either reinvested in those countries, applied in establishment and other charges in those countries, remitted direct to other foreign countries for investment or for the general purposes of the society, or remitted to London. Yearly accounts were prepared in which all the interest on investments in foreign countries was included, and out of the profits shewn by the accounts a dividend was paid yearly to the shareholders. The surplus funds of the society divisible as profits were ascertained by actuarial valuation once in three years, and all

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the interest on investments in foreign countries was included in the triennial account:—

Held, that all the interest on foreign investments was received in the United Kingdom within the meaning of the fourth case of s. 100 of 5 & 6 Vict. c. 35, and was liable to income tax under Sched. D.

APPEAL from the judgment of a Divisional Court on a case stated by the commissioners for general purposes of the income tax for the City of London.

1. At a meeting of the commissioners the Gresham Life Assurance Society, Limited, appealed against the assessment made upon the society for the year ending April 5, 1893, in respect of profits arising from interest, dividends, and rents which had not been taxed at their source. For the purposes of this case the word "interest" hereinafter used includes dividends and rents. The appellants had already been assessed to and had paid income tax on 6516*l.* 12*s.* 9*d.*, assessed in respect of such interest, dividends, and rents. The amount surcharged by the surveyor was 150,000*l.*, and the amount confirmed by the commissioners 143,483*l.* 7*s.* 3*d.*

2. The Gresham Life Assurance Society, Limited, carries on the business of life assurance and of selling or granting annuities pursuant to the provisions of a deed of settlement dated July 30, 1848, as modified by a deed dated July 17, 1893.

3. The registered and head office of the society is in London, where the directors and shareholders meet and whence the affairs of the company are managed.

PART I.

4. There are certain countries in which the society does no business of any kind, but the society has funds invested in various securities in those countries. The interest on those securities is either (*a*) reinvested in those countries upon securities there, or (*b*) remitted direct to other foreign countries for investment in those countries, (*c*) remitted to Great Britain.

5. There are certain countries in which the society carries on business of life insurance by means of local agents or managers. The society has funds invested in various securities in those countries. By the laws of some of those countries the society

is obliged to keep invested in securities within those countries respectively a sum to answer liabilities on its policies and other engagements in those countries respectively. No part of the money so compulsorily invested can be removed until the liability in respect of the policies and engagements has run off. The interest on the investments, whether compulsory or not, is either (*d*) reinvested in those countries upon securities there, (*e*) applied in establishment and other expenses in the countries where the interest is earned, (*f*) remitted direct to other foreign countries for investment, (*g*) remitted direct to other foreign countries for the general purposes of the appellants, or (*h*) remitted to Great Britain.

6. It is essential for the purposes of the appellants as an insurance company that the greater portion of the premiums received by them should be invested in interest-bearing securities, and that from time to time the interest accruing thereon should also be invested, and the investments mentioned in paragraphs 4 and 5 are accordingly made for that purpose. The investments are made in the course of and for the purposes of the business of the society as an insurance company, and the total amount of such investments is taken into account in arriving at the profits of the society.

7. All interest capitalized abroad by reinvestment would, in the event of the winding-up of the society or the discontinuance of the society's operations in any particular country, form part of the assets of the society available for the fulfilment of the society's obligations.

8. The society contended before the commissioners that under the fourth case, s. 100 of 5 & 6 Vict. c. 35, only such part of the interest as was received in Great Britain during the year of account was assessable to tax, and that the interest applied as in (*a*), (*b*), (*d*), (*e*), (*f*), and (*g*) was exempt from tax.

It was contended on behalf of the Crown that there should be no reduction of the assessment, and that on the above facts there was a constructive remittance of the interest to this country.

The commissioners declined to reduce the assessment.

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PART II.

10. The amount of the surplus funds of the society divisible as profits is ascertained by actuarial valuation once in every three years. All the investments mentioned in paragraphs 4 and 5 are made in the course of and for the purposes of the business of the society, and the total amount of such investments is taken into account in arriving at the profits of the society. The amount of the society's profits for the year of account so ascertained was 17,342*l.* 3*s.* The society is willing to pay tax upon this sum, and contended before the commissioners that if the total of the interest on the society's investments in the year of account exceeds the profits of that year the excess is not taxable, and the assessment should be reduced accordingly. The society, therefore, claimed to have its assessable income reduced to 17,342*l.* 3*s.*

11. It was contended on behalf of the Crown that on the facts the assessment should stand, and that, even if the society's profits as ascertained at the actuarial valuation were less in amount than their untaxed interest, such untaxed interest is properly assessable without deduction.

The commissioners confirmed the assessment.

The questions for the opinion of the Court were:—

1. Whether the interest described in 4 and 5 (*a*), (*b*), (*d*), (*e*), (*f*), and (*g*) respectively was liable to taxation?

2. Whether the assessment should be reduced to 17,342*l.* 3*s.*, the amount of profits of the society?

The following supplemental statement was appended to the case:—

1. The Gresham Life Assurance Society, Limited has not been charged to income tax under Sched. D in respect of profits for the year ended April 5, 1893 (called hereinafter "the year of assessment"), except in respect of the interest dividend of 5 per cent. on the paid-up capital payable under the deed of settlement out of the profits of the company.

2. The society has a subscribed capital of 100,000*l.*, divided into 20,000 shares of 5*l.* each, and interest is annually paid to the shareholders on the amount paid up thereon. The profits

of the society are divisible among the shareholders and participating policy-holders, or otherwise applied in the manner indicated in the deed of settlement and the laws and regulations of the company, but (except as above mentioned in paragraph 1 and afterwards mentioned in paragraph 4 hereof) no such profits were divisible or divided during the year of assessment.

3. The sole and complete management and control of all the affairs, operations, and business of the society, subject to the laws of the various countries in which the society carries on its business, both in and out of the United Kingdom, were and are alike, subject to the control of general meetings of the shareholders, vested in and exercised by the board of directors at the head office in London, where the meetings of the directors and the shareholders are held, and dividends and division of profits declared and made, and dividends are payable.

4. The printed accounts (revenue accounts and balance-sheets, &c.) are made up annually, and shew the nature and extent of the entire business and financial operations carried on by the society both in the United Kingdom and abroad, and as one entire and indivisible business. The profits are ascertained by actuarial valuation once in three years. Interest amounting to 1085*l.* 12*s.* was paid during the year of assessment to the shareholders at the rate of 5*l.* per cent. per annum on the total amount of their paid-up capital. This interest was paid out of profits as above mentioned.

5. Official returns were made pursuant to the Life Assurance Companies Act, 1870, including the revenue accounts and balance-sheets of the society for the periods ending June 30, 1891, December 31, 1892, and December 31, 1893, and also including the valuation balance-sheets, consolidated revenue accounts, and statements for the three years ending June 30, 1891, and for the four and a half years ending December 31, 1895.

6. The claims and annuities payable under policies granted by the society at their branches and agencies abroad are payable and are actually paid at the branches and agencies abroad, and no moneys are remitted abroad from the United Kingdom

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specifically for that purpose, but moneys would be remitted abroad to such countries if and when necessary to meet payments there made.

7. The agents or managers of the agencies and branches in the countries out of the United Kingdom, in which the society carries on the business of life insurance and of selling or granting annuities, from time to time account to the head office for all moneys received and paid at the agencies and branches by or on behalf of the society, and render to the head office full accounts setting forth all transactions.

8. The receipts at the agencies and branches abroad include (inter alia) premiums received from policy-holders, payments for purchase of annuities, and interest or dividends arising from foreign securities or investments. The payments at these agencies and branches include (inter alia) payments under policies on account of claims, payments on account of annuities, policy surrender values, bonuses, commissions, management, and office expenses. All receipts, payments, and balances in hand at these agencies and branches are dealt with from time to time in the manner directed by means of special or general instructions by the board of directors from the head office in London, and are controlled by those directors by means of those instructions, and are either invested abroad, applied towards payments abroad, or are otherwise dealt with or expended as may be required or directed by the board of directors in London.

9. All interest and dividends, including those the subject of the assessment appealed against, are included, as money received by the society, in the revenue accounts and consolidated revenue accounts of the society, under the head of "Interest, dividends, and rents," and are taken into account in arriving at the amount of the life assurance and endowment funds and life annuity fund, set out in the valuation balance-sheets of the society upon which the surpluses or profits are ascertained. The accounts are made out in the United Kingdom at the head office of the society, and are rendered to the shareholders as accounts of all the society's transactions and affairs.

10. The accounts of the society are made out in the forms prescribed in the schedule to the Life Assurance Companies Act, 1870, and no distinction is made in the accounts of the society with regard to receipts or expenditure, whether arising or made in the United Kingdom or abroad, but the whole receipts and expenditure at home and abroad are included together in one entire account in the revenue and other accounts and valuations of the society.

11. If the interest and dividends in question, and the premium received abroad had not been retained abroad, or remitted from one foreign country or colony to another, the society would have been obliged to send out from the United Kingdom to their foreign agencies and branches for the payment of claims and annuities, or discharge of other obligations, or for the payment of expenses, purposes of compulsory investment, or otherwise, an amount sufficient for such purposes. By not remitting the interest, dividends, and premiums in forma specifica to the United Kingdom the society saves the cost of the exchange, expense, and inconvenience which remittances in that form would involve. The society allege (but the Crown does not accept the allegation as being the fact) that the premiums received abroad are sufficient to pay the annuities and claims payable abroad. If this allegation is material for any purposes of this case, then the case is to be remitted to the commissioners for the ascertainment by them of the actual facts.

12. In paragraph 4 of the case, the foreign countries described under (*b*) include those where the society carries on no business as well as countries where the society carries on business, and also countries by the laws of which a compulsory investment is required as indicated in paragraph 5 of the case.

13. In paragraph 5 of the case stated, the establishment and other expenses described under (*e*) include payment of claims under policies and annuities. The foreign countries referred to in (*f*) and (*g*) include countries where the society carries on business as well as countries by the laws of which a compulsory investment is required. The general purposes referred to under (*g*) include payment of claims under policies and annuities.

14. The amount of the profits of the society, if estimated

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under case 1 of Sched. D, for the year of assessment on the average of the preceding years ending June 30, 1891, would be 40,472*l.*

15. Remittances on behalf of the society of amounts representing interest, dividends, or other moneys from one foreign country or colony to another colony or foreign country are not made viâ the United Kingdom, nor by means of securities (negotiable instruments or others) payable in the United Kingdom.

The Divisional Court (Grantham and Kennedy JJ.) gave judgment for the Crown.

The society appealed.

1900. Nov. 24. *Haldane, Q.C.*, and *Stewart-Smith* (with them *Sir E. Clarke, Q.C.*), for the appellants. It may be admitted for the purposes of this case that the appellants are liable to pay income tax on the interest of the investments in question, so far as it is included in the "profits" arrived at by means of the actuarial estimate made in pursuance of the Life Assurance Companies Act, 1870, s. 7. The question is whether they are liable to pay the tax on the interest as "interest" under the last clause of Sched. D of the Income Tax Act, 1853, as money received in the United Kingdom. The case of *Colquhoun* v. *Brooks* (1) shews that the tax is not payable on such interest, unless it is either actually or constructively received in the United Kingdom. The interest in question is certainly not actually received in the United Kingdom; and it is contended that, if there can be such a thing as constructive receipt, it is not constructively received in the United Kingdom. An estimate of "profits" is made in which it is taken into account as an asset, and on those "profits" the appellants are willing to pay the tax, but that does not amount to a constructive receipt of the interest in this country. It must be taken into consideration as an asset, but not as an asset in this country. The case of *Forbes* v. *Scottish Provident Institution* (2) is an authority in the appellants' favour. The case of

(1) (1889) 14 App. Cas. 493.
(2) (1895) 23 R. 322; 33 Sc. L. R. 228; 3 Tax Cases, 443.

Scottish Mortgage Company of New Mexico v. *Inland Revenue Commissioners* (1) is distinguishable, because there the company, having applied funds in the United Kingdom ultra vires, were bound to replace them out of the interest received abroad. That interest might be considered as in contemplation of law brought to the United Kingdom, because the company could not set up their illegal action in paying dividends out of capital, and so could not be heard to say that the foreign interest had not reached this country. The case of *Norwich Union Fire Insurance Co.* v. *Magee* (2) was wrongly decided. Where the money is actually received in the United Kingdom the Crown is entitled to particulars under the Income Tax Acts. There is no right to demand an account of the particular items in this case, and no machinery by which they can be arrived at. The 150,000*l.* is merely an estimate derived from the return made to the Board of Trade. The absence of machinery to arrive at the figures indicates an absence of intention to tax, as pointed out by Lord Herschell in *Colquhoun* v. *Brooks*. (3) Investments in a foreign country may produce in any given year a large sum, and that would appear in the triennal valuation, although a month after it was earned it might have been absorbed in the payment of claims under policies in the same country. The money would never have reached this country, yet for the Crown it is said that it must be treated as constructively received in this country. That is to read into the fourth case the words "or which for the convenience of the person entitled has been received elsewhere."

Sir R. B. Finlay, *A.-G.*, and *Sir E. H. Carson*, *S.-G.* (with them *Danckwerts*, *Q.C.*), for the respondent. The only question is whether the interest on foreign securities was received in this country within the meaning of the fourth case. If only actual remittances on money are to be taken into account, the rule could hardly ever apply. If a man has a creditor in France and a debtor in America, and to save a double exchange the money is sent direct from America to France, it never comes

(1) (1886) 14 R. 98; 24 Sc. L. R. 87; 2 Tax Cases, 165.

(2) (1896) 3 Tax Cases, 457; 73 L. T. 733.

(3) 14 App. Cas. 493, at p. 506.

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to this country, but it is received here just as much as if bills had been remitted here and forwarded from here to France. The business of the society is described in the case as one business; it is carried on in several countries, but the entire management and control is exercised in London. All expenditure and receipts abroad are dealt with here, and the result is the same whether remittances to and receipts from foreign agencies are actually sent from and to the principal office, or whether the accounts are adjusted abroad by balancing expenditure and receipts. The decision in *Scottish Mortgage Company of New Mexico* v. *Inland Revenue Commissioners* (1) is in point. In that case no question of estoppel could possibly be raised, and the mention of the illegality of payment of dividends out of capital was only put forward by way of evidence that the interest was received here. *Forbes* v. *Scottish Provident Institution* (2) is not inconsistent with the previous case, for the circumstances were different, and the decision proceeded on the ground that the company were not carrying on business abroad, and had done nothing with regard to the money abroad but simply left it there. In the present case they have dealt with the interest on foreign securities by directing that something shall be done with it which relieves them from remitting money to their agencies.

The argument on behalf of the Crown covers more than the moneys dealt with abroad in such a manner as to relieve the society from liability to remit to their agents. The society has in fact dealt with the whole of their foreign receipts in their accounts, and on the next triennial valuation all those receipts will be taken into account in arriving at the balance of profits. Further, the dividends to the shareholders were paid in the year of assessment on the footing of the receipt by the society of these sums from abroad. The accounts supply a different way of proving the receipt of the money, and they cover all the interest and dividends on the foreign securities of the society. The distinction between this case and *Forbes* v. *Scottish Provident Institution* (2) has already been pointed out;

(1) 14 R. 98; 24 Sc. L. R. 87; 2 Tax Cases, 165.

(2) 23 R. 322; 33 Sc. L. R. 228; 3 Tax Cases, 443.

but if the case is not distinguishable on the point now being discussed, the Court should differ from that decision.

[They cited *Bartholomay Brewing Co.* v. *Wyatt* (1) and *San Paulo Ry. Co.* v. *Carter*. (2)]

Haldane, Q.C., in reply.

A. L. SMITH M.R. This is an appeal from a judgment of the Queen's Bench Division in favour of the Crown. The assurance society appeal, and the point is whether or not, under the provisions of the Income Tax Acts and the rules in Sched. D, the Crown, upon the facts of the special case, is entitled to income tax, at the current rate during the year of assessment, upon interest received in account in this country on foreign securities. This brings me to the fourth case under Sched. D, because we must first get at the true interpretation of that case before we can deal with the matters which appear upon the present case.

The fourth case applies, among other things, to the duty to be charged in respect of interest arising from foreign securities, and enacts: "The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the sums (so far as the same can be computed) which have been or will be received in Great Britain in the current year without any deduction or abatement." The question is, what is the meaning of the words "have been or will be received in great Britain"? There is no doubt those words are a limitation upon the otherwise general words of the fourth case. At one time in this case, and by learned judges in other cases, it has been suggested that the word "received" should be read as "constructively received." I do not like that phrase, for in my judgment there must be a receipt in the way money from abroad is ordinarily received here, but that receipt need not be in specie; it may be in account, and in my opinion a receipt in account is just as much a receipt as a receipt in specie. That, in my judgment, is the true meaning of the fourth case, and I think that is the reading of it arrived at by the judges in the Scottish case—*Scottish Mortgage Company of New Mexico* v.

(1) [1893] 2 Q. B. 499. (2) [1896] A. C. 31.

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Inland Revenue Commissioners. (1) They did not put this in so many words, but they came to the conclusion in that case that there had been a receipt in account of foreign dividends, and they held, that being so, that the Crown was entitled to income tax upon the dividends so received.

The fact, in this case, is that the society has received dividends, though not in specie on foreign securities from their agents in foreign parts. These dividends so received they have brought into account in making up their profit and loss account. Clause 4 of the supplemental case says that "Interest amounting to 1085*l*. 12*s*. was paid during the year of assessment to the shareholders at the rate of 5*l*. per cent. per annum on the total amount of their paid-up capital. This interest was paid out of profits as above mentioned." That is, they brought into account, with their income from other sources, the dividends on foreign securities, and on the other side they debited their expenditure, and out of the profits so ascertained they paid their shareholders. It seems to me that the irresistible inference to be drawn from the facts stated is that the society have received these dividends on foreign securities in account, they have dealt with them as received in account, and they have distributed them as having been received in account, and they cannot say that they have not received them in the United Kingdom when the Crown claims income tax on them. It appears to me that on this point, which is sufficient to decide the case, the decision of the Court below was right, and that the Crown is entitled to income tax upon all such interest on foreign securities as has been brought by the society into their profit and loss account. The Scottish case that I have mentioned, and the later case of *Forbes* v. *Scottish Provident Institution* (2), though not binding on us, both support this conclusion. I must say that at the first blush the judgment of the President in the last-mentioned case would appear to be against the argument for the Crown in this case; but, as was pointed out by my brother Collins in the course of the argument, the ground of the decision was that the foreign dividends

(1) 14 R. 98; 24 Sc. L. R. 87; 2 Tax Cases, 165.

(2) 23 R. 322; 33 Sc. L. R. 228; 3 Tax Cases, 443.

were left in foreign parts and were not brought into account in making up the profit and loss account in the United Kingdom.

There are other cases which have been cited, and which are also in favour of the view that the Crown is right in this case; but I do not think it necessary to go into them.

There is one other matter. I think the true meaning of paragraph 11 of the supplemental case is that it was inserted for the purpose of differentiating the bringing over the dividends in specie and their being brought into account, and that it was not intended as a statement that the dividends were left abroad and did not come to this country either in account or otherwise.

For these reasons I am of opinion that the Crown is entitled to judgment, and that the appeal should be dismissed.

COLLINS L.J. I am of the same opinion. Unless it is to be held that there can be no receipt in the United Kingdom short of a payment in specie or in forma specifica, as it is put in one of the Scottish cases, I can find no principle which would be capable of being worked intermediate between such a holding and a holding that a receipt is shewn in this case by the fact that there has been an account taken between the parties, on the basis of which the party receiving—that is, the insurance company—has treated the sums in question as received, and has made payments upon that footing. It seems to me that if that does not amount to a receipt in this country—it unquestionably amounts to a receipt in point of law—there is no middle course which we can accept, or anything short of holding that the payment must be made in specie. Such a conclusion, it seems to me, would be contrary to common sense, and would upset the ordinary transactions of commerce. It is common knowledge that the mercantile business of the world is transacted without any actual transfer of specie, and what has happened in this case is what happens in commercial transactions every day. Whether between people in different countries, or between people in different places in the same country, a settlement in account would support a plea of payment in law, and I think that, when you have a payment in

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Collins L.J.

point of law, the transaction amounts to an actual delivery by the debtor to his creditor of the sum due. It is the business of the debtor to seek the creditor, and, if the facts will support a plea of payment, that, I think, carries with it the presumption that the person paid has received the money at the place where he is. That seems to me to be common sense apart from authority; but there is the authority of the case decided in Scotland so far back as 1886, and, not so far as I know, questioned from that day to this. The case of *Scottish Mortgage Company of New Mexico* v. *Inland Revenue Commissioners* (1) is exactly in point, and the same elements are present in each case. In the argument for the appellants, the case was distinguished on the ground that there was what was called an estoppel. The Lord President no doubt states a fact as influencing his judgment, which is that it would have been illegal for the company to have treated the proceeds of money raised by debentures as applicable to the payment of dividends. He used that fact as an additional reason for holding that the money which was legally applicable to the payment of dividends was so applied by them out of money coming from the other side of the water. That was only one stepping-stone by which the conclusion was arrived at that the settlement in account was what it purported to be—a utilization of the funds on the credit side for the purpose of meeting the expenditure on the debit side. The other two judges do not rely on that element, but, whether it was an element in the case or not, it was not an estoppel, and it does not differentiate that case from an ordinary case where there are items on one side and items on the other, a balance struck, and the balance applied. That case was followed by *Forbes* v. *Scottish Provident Institution* (2), which was said to be inconsistent with the previous decision, so as to leave us at liberty to choose either. I do not think the choice is open to us, for it does not seem to me that there is anything inconsistent in the two cases. In the second of them the Lord President was dealing with a case in which nothing had been done, on this side of the water, with the funds that

(1) 14 R. 98; 24 Sc. L. R. 87; 2 Tax Cases, 165.

(2) 23 R. 322; 33 Sc. L. R. 228; 3 Tax Cases, 443.

came into existence on the other side. In dealing with the case he said: "There is nothing, as far as appears, done with the colonial interests in question except to leave them where they are"; and that, I think, is the keynote to the whole position. The observations that follow are to be read by the light of that preliminary observation, and it is pointed out that the Mexican case was totally different. It seems to me that the decision adopts the previous one, and that there is no inconsistency. I think, therefore, that, it being found in the case—for so I treat it—that, as the result of an account in which the interest on these foreign securities is carried in, a balance was arrived at, and that balance applied in the payment of dividends, there has clearly been a receipt in this country. I do not think that the point that the payment of dividend must be regarded as only provisional, leaving the rights of the parties as though no such payments had been made, can be supported in view of the finding in paragraph 4 of the case—a finding which is based, as has been pointed out, on an obligation imposed by the deed by which the society is governed.

I think the Solicitor-General was well justified in pointing out that this is one undivided society, and that it carries on one business, and not separate businesses in different parts of the world. Applying that to the fact that the account is taken, and a balance struck, and the balance applied by the central authority, whose locus is the United Kingdom, I think they cannot do this without there being an implication that they have received the money over which they are exercising dominion, and which they are applying to the payment of their debts.

STIRLING L.J. I am of the same opinion. The question is whether certain interest or dividends which accrued to the society in foreign countries can be said to have been received by them in the United Kingdom. It is conceded that they were not received in specie; but that word is not to be found in the Act, and the question is whether in point of fact the interest has been received in some form or another in the United Kingdom.

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Stirling L.J.

The facts which are relied on for the purpose of shewing that the interest has been received by the society in the United Kingdom are, shortly, that the society carries on business in England as well as in a number of other countries, but that the business, as stated in the case, is one indivisible business. The accounts which are prepared yearly by the society in accordance with the Act of 1870 embrace without distinction all the business transactions of the society in whatever country they are carried on. Under one of the articles of the deed which governs the affairs of the society the shareholders are entitled to be paid yearly out of the profits a dividend of 5 per cent. upon the amount of capital which is paid up. I cannot see anything in that article, or in any of the others to which our attention has been called, which makes such a payment provisional. No doubt the society do not every year go through the form of having a valuation of every asset; that is only done, as I understand, once in every three years, but in every intermediate year they make up accounts, as they are obliged to do so under s. 5 of the Life Assurance Companies Act, 1870, and bring in all the property of the society, capital as well as income, and upon the basis of those accounts they pay the dividend of 5 per cent. to the shareholders.

That being so, the case is brought within the decision in 1886 of the First Division of the Court of Session in *Scottish Mortgage Company of New Mexico* v. *Inland Revenue Commissioners* (1), where it was held that such a dealing with the receipts of interest in foreign parts constituted a receipt, or was evidence of a receipt, within this country. It was at first contended, as I understood, that there could be no receipt in this country unless in some form there was a specific remittance to this country of the money which was received abroad, but that could not be maintained. In the case in Scotland this happened. There was in the hands of agents of the company in America a certain sum in respect of interest which had accrued there, and there was in the hands of the directors at home a fund which had arisen on capital account which in the ordinary course would have to be remitted to America and

(1) 14 R. 98; 24 Sc. L. R. 87; 2 Tax Cases, 165.

invested there in securities. Dividends were payable here, and with a view to the payment of them the company directed their agents in America to retain the interest which was in their hands and apply it to investments in America. The company would then retain in this country the money which should go to America, and apply that in payment of dividends to their shareholders. That was decided to amount to a receipt in this country of the American interest. That seems to me to be exactly in point, and the second case in Scotland—*Forbes* v. *Scottish Provident Institution* (1)—is quite capable of being distinguished on the ground that an account had been prepared in which the foreign dividends had been introduced, but that nothing more had been done. Really, the matter stood on the same footing as if a man made an entry in his own book and did not act on it. I should be sorry to depart from a decision made as long ago as 1886, followed by the Courts in this country in various cases, and never dissented from. Further, it seems to me that the decision was well justified and ought to be followed.

Appeal dismissed.

Solicitors for appellants: *Devonshire, Monkland, Davies & Sanders.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

(1) 23 R. 322; 33 Sc. L. R. 228; 3 Tax Cases, 443.

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Nov. 21.

[IN THE COURT OF APPEAL.]

THE TAFF VALE RAILWAY COMPANY *v.* THE AMALGAMATED SOCIETY OF RAILWAY SERVANTS AND OTHERS.

Trade Union—Registered Name—Right to sue or be sued in Registered Name—Trade Union Act, 1871 (34 & 35 *Vict. c.* 31)—*Trade Union Act*, 1876 (39 & 40 *Vict. c.* 22).

A trade union, registered under the Trade Union Acts, 1871 and 1876, cannot be sued under its registered name.

APPEAL from two orders made by Farwell J. at chambers.

The plaintiffs brought an action against the Amalgamated Society of Railway Servants, a trade union registered under the Trade Union Acts, Richard Bell, the general secretary, and James Holmes, the local secretary at Cardiff, for an injunction to restrain the defendants from watching or besetting, or causing to be watched or beset, the Great Western Railway Station at Cardiff, or the works of the plaintiffs, or any of them, or the approaches thereto, or the places of residence, or any places where they might happen to be, of any workmen employed by or preparing to work for the plaintiffs, for the purpose of persuading or otherwise preventing persons from working for the plaintiffs, or for any purpose except merely to obtain or communicate information, and from procuring any persons who might have entered, or might enter, into contracts with the plaintiffs to commit a breach of such contracts.

The plaintiffs took out a summons for an interim injunction in the terms of the injunction claimed in the action. The defendant society took out a summons asking that the society should be dismissed from the action, on the ground that a trade union could not be sued in its registered name. The learned judge refused to dismiss the society from the action, and granted an interim injunction against all the defendants. The defendant society appealed against so much of the two orders as applied to them. The other defendants did not appeal.

Nov. 12. *Haldane, Q.C.*, and *T. Bateman Napier* (with them *Robson, Q.C.*, *S. T. Evans*, and *A. Clement Edwards*), for the society. The society, which is an association of many thousands of railway servants, cannot be sued unless it is incorporated, or the Legislature has said that it can be sued as if incorporated. Our law recognises nothing between an association of individuals and a corporation except in certain anomalous cases such as that of guardians of the poor or churchwardens: *Withnell* v. *Gartham*. (1) Under the Trade Union Acts a trade union is lawful to the extent that agreements and trusts are not rendered void or voidable because some of the purposes of the union are in restraint of trade. This combination is recognised in spite of considerations that would without the Acts have made it illegal. To carry out this object the property of a trade union is vested in the trustees by s. 8 of the Act of 1871 and ss. 3 and 4 of the Act of 1876, and by the first-mentioned section, in all actions, or suits, or indictments, or summary proceedings "touching or concerning any such property," the property may be stated to be in the trustees. This provision is not consistent with the suggestion that it must be inferred that the Legislature intended to treat a trade union, which is nowhere directly incorporated, as if it were a corporate body. The provision, moreover, applies to civil proceedings in respect of the property of the union. For the purposes of this argument it must be taken that the acts complained of were done by the authority of the society; but that does not affect the question how the remedy for those torts is to be obtained. If the right to sue the trustees were not limited to rights of property, there would be no difficulty in making the funds of the union liable: *Ruck* v. *Williams* (2), in which case the clerk was for all purposes made the person who could sue or be sued in respect of matters done by the body. The union has no legal entity any more than a club has, or an association of persons in partnership not registered under the Companies Acts. Where the Legislature intends to incorporate a body of persons such as a company under the Companies Act, 1862, or a society

(1) (1795) 6 T. R. 388; 3 R. R. 218.

(2) (1858) 3 H. & N. 308.

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under the Industrial and Provident Societies Act, 1893, or the Building Societies Acts, apt words are used which are not to be found in the Trade Union Acts. It may be practically impossible to sue the members of this union, but the object of the plaintiffs — to get at the funds of the union —cannot be attained by the short cut of suing the members in the registered name of the union. The union ought, therefore, to be struck out of the action and the injunction dissolved.

[They cited *Rigby* v. *Connol* (1); *Mersey Docks* v. *Gibbs* (2); *Whitehouse* v. *Fellowes* (3); *Wolfe* v. *Matthews* (4); *In re Amos, Carrier & Price* (5); *Conservators of the River Tone* v. *Ash.* (6)]

Sir E. Clarke, Q.C., and *B. Francis Williams, Q.C.* (with them *Holman Gregory*), for the plaintiffs. Before the Trade Union Acts some of the trade unions had deposited their rules under the Friendly Societies and other Acts, and the intention of the Act of 1871 was to create a new status for trade unions registered under it. The Act deals throughout with "a trade union," and in numerous provisions contemplates that the trade union is an entity with perpetual succession. By the Act of 1871 it is a registered body (s. 6), with power to purchase, mortgage, or sell land (s. 7), with property which is vested in trustees (s. 8); it may proceed by indictment or summary process (s. 12), is liable to penalties (s. 15 of the Act of 1876), and may in other respects act in its own name. The question of property does not arise on an application for an injunction: whether the association is a corporate body or not, the Court will interfere by injunction to prevent the doing of a wrong. The union is a body constituted by statute, entitled to hold large funds and to apply them under circumstances contemplated by the Act. It has, therefore, a legal entity apart from any question whether it is a corporate body or not.

Haldane, Q.C., in reply.

Cur. adv. vult.

(1) (1880) 14 Ch. D. 482.
(2) (1866) L. R. 1 H. L. 93.
(3) (1861) 10 C. B. (N.S.) 765.
(4) (1882) 21 Ch. D. 194.
(5) [1891] 3 Ch. 159.
(6) (1829) 10 B. & C. 349.

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Nov. 21. The judgment of the Court (A. L. Smith M.R. and Collins and Stirling L.JJ.) was read by

A. L. SMITH M.R. This is an action brought by the Taff Vale Railway Company against a trade union in its registered name of "The Amalgamated Society of Railway Servants," and against Richard Bell and James Holmes, officers of the union, for unlawful picketing, and it claims an injunction and other relief, which would include a claim for damages.

No question upon this appeal arises as to the competency of the action against Bell and Holmes; the point made is that this action is not maintainable against the defendants who constitute a trade union, consisting of a great number of persons, in the name of "The Amalgamated Society of Railway Servants." The point is important, for if a trade union can be sued in the manner proposed in this case the funds of the union will be liable to be taken in execution under a judgment obtained against the union in the society's name.. Whether this ought to be so or not is one thing into which I have not to inquire; whether it is so, that is, whether the union can be sued in the manner proposed, is another matter, and this I have to decide. Farwell J. has held that this action is maintainable against the union in the society's name, and against this judgment it is that the members of the trade union appeal. The learned judge in the early part of his judgment says that "a trade union is neither a corporation nor an individual nor a partnership between a number of individuals," and in this I entirely agree. There can, in my judgment, be no doubt that at common law the defendants could not be sued in the name in which they are sued in this action, any more than a tradesman could sue a defendant in the name of a West-end club for goods supplied by him to that club, for the simple reason that the name of a club is not the name of a corporation nor of an individual nor of a partnership, which, apart from statute, are the only entities known to the law as being capable of being sued. In order, therefore, that this action can be maintained against the defendants in the name of "The Amalgamated Society of Railway Servants" there must be some statute enabling this to be done either by creating the society a corporation, or enacting

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that it may be sued in its registered name; and this, as the learned judge states—and in this I also agree—depends upon the true construction of the Trade Union Acts of 1871 and 1876.

Now, in considering these Acts, it is in the first place to be pointed out that there is no section empowering a trade union to sue or to be sued in its registered name, nor is there any provision as to constituting the society a corporation so that it might be sued as such. This is the more remarkable if, as the learned judge holds, it was the intention of the Legislature that a trade union was to be sued in its registered name, seeing that when it was desired that a society should sue or be sued in its registered name the Legislature knew well how in plain terms to bring about such a result. For instance, in the Companies Act, 1862 (25 & 26 Vict. c. 89), by s. 6 it is enacted that seven or more persons may be registered, and the section goes on to enact that after registration they shall form an incorporated company, with or without limited liability. The first part of the section is re-enacted in s. 6 of the Trade Union Act of 1871, but the last part about incorporation is pointedly omitted. Again, in the Building Society Act, 1874 (37 & 38 Vict. c. 42), s. 9 will be found as follows: "Every society now subsisting or hereafter established shall, upon receiving a certificate of incorporation under this Act, become a body corporate by its registered name, having perpetual succession, until terminated or dissolved in manner herein provided, and a common seal." Again, in the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), by s. 21 it is enacted: "The registration of a society shall render it a body corporate by the name described in the acknowledgment of registry, by which it may sue and be sued, with perpetual succession and a common seal, and with limited liability; and shall vest in the society all property for the time being vested in any person in trust for the society; and all legal proceedings pending by or against the trustees of any such society may be prosecuted by or against the society in its registered name without abatement." It is true that the Amalgamated Society of Railway Servants is the registered name of the trade union sued; but how does this fact of itself, without more, render the

society an entity capable of being sued in that name? The mere registration has no such effect. Farwell J. does not suggest in his judgment that in the Trade Union Acts he can find any sections in terms authorizing an action against a trade union in its registered name, or that by the Acts trade unions are incorporated. But the learned judge says the Legislature has legalized it—i.e., the trade union—and it must be dealt with by the Courts according to the intention of the Legislature. The learned judge says: "Although a corporation and an individual or individuals may be the only entities known to the common law who can sue or be sued, it is competent to the Legislature to give to an association of individuals, which is neither a corporation nor a partnership nor an individual, a capacity for owning property and acting by agents; and such capacity, in the absence of express enactment to the contrary, involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents"—in other words, the liability of being sued in its registered name. It is with regard to this last paragraph, which is the basis of the judgment, that, with all submission, we cannot agree. When once one gets an entity not known to the law, and therefore incapable of being sued, in our judgment, to enable such an entity to be sued, an enactment must be found either express or implied enabling this to be done, and it is incorrect to say that such an entity can be sued unless there be found an express enactment to the contrary. Where in the Trade Union Acts is to be found any enactment, express or implied, that a trade union is to be sued in its registered name? Express there is none, and it is clear that a trade union is not made a corporation, as the Acts above referred to shew is constantly the case with other societies. That the Legislature has omitted to enact this in the Trade Union Acts of 1871 and 1876 is clear; and in our judgment this has not been omitted by error. That a trade union is legalized by the Act of 1871 we do not doubt, nor does the learned judge; and this Act, together with the Act of 1876 and the Conspiracy Act, 1875, was the charter of trade unions, as I pointed out in *Lyons* v. *Wilkins* (1); but it is not

(1) [1896] 1 Ch. 811.

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enacted in this charter that a trade union is to be liable to be sued in its registered name, as contended for by the plaintiffs, so that they may take the funds of the union in execution. Such a liability is not to be found in the Acts, and in our judgment the intention of the Legislature which the learned judge relies on is only to be found in what the Legislature has enacted. Moreover, by s. 9 of the Act of 1871 it is expressly enacted that the trustees of a trade union registered under the Act, or any other officer of the union who may be authorized to do so by the rules, may bring or defend any action in any Court of law touching the property of the trade union—a most remarkable section if, as is argued for the plaintiffs and held by the learned judge, the purview of the Act is that a trade union can be sued in its registered name. If this were so, what is the good of this section expressly enabling the trustees or other officer of the union to sue or be sued in respect of property? We can find nothing in the Acts wherefrom the inference is to be drawn that the Legislature has enacted that a trade union can be sued in its registered name; but, by reason of the language of the Acts and what is omitted therefrom, if necessary, we should find the exact contrary.

In our judgment, for the reasons given above, a trade union cannot be sued, as is now attempted. Sects. 15 and 16 of the Act of 1876 only shew as regards penalties that the funds of the union may be got at. The cases which are relied on by the learned judge do not affect the question which now arises for decision. They relate to the extent of liability imposed by the Legislature on a body which was either incorporated—*Mersey Dock Trustees* v. *Gibbs* (1)—or empowered to be sued by one of its officers: *Ruck* v. *Williams* (2); *Whitehouse* v. *Fellowes*. (3) The case of *Temperton* v. *Russell* (4), referred to during the argument in this Court, seems to have been argued and decided upon the assumption that an action such as the present was not maintainable. As there is no statute empowering this action to be brought against the union in its registered name, it is not maintainable against the Amalgamated Society

(1) L. R. 1 H. L. 93.
(2) 3 H. & N. 308.
(3) 10 C. B. (N.S.) 765.
(4) [1893] 1 Q. B. 435.

of Railway Servants eo nomine, and these defendants must, therefore, be struck out; the injunction against them must be dissolved, and the appeal allowed.

Appeal allowed.

Solicitors for plaintiffs: *Riddell & Co., for Meyrick & Davies, Cardiff.*

Solicitors for defendants: *Williamson, Hill & Co., for Ingledew & Sons, Cardiff.*

A. M.

THE QUEEN *v.* STODDART.

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Nov. 17.

Gaming—Office used for Betting—"Coupon Competition"—Events relating to Horse-races—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *s.* 1.

The defendant was the occupier of an office and the proprietor of a newspaper published weekly at that office. Each number of the paper contained a notice of what was called a "coupon competition"—that is to say, of a promise by the defendant to pay a certain specified sum of money to such persons as should correctly guess the result of a certain horse-race then shortly about to be run, and should write their guesses upon certain forms called "coupons," which were issued with each number of the newspaper, and should return the coupons so filled up to the defendant's office, together with the sum of one penny in respect of each guess made. A large number of persons every week sent in to the defendant's office coupons filled up as aforesaid, accompanied by remittances of money. The defendant was upon these facts convicted under the Betting Act, 1853, of having unlawfully kept the office for the purpose of money being received by her as the consideration for undertakings to pay thereafter money on events relating to horse-races.

Held, that the conviction was right.

CASE stated by Channell J. for the opinion of the Court for Crown Cases Reserved.

The defendant, Ada Jane Stoddart, was tried at the Central Criminal Court on an indictment charging that she, on March 23, 1900, and on divers other days between that day and June 22, being the occupier of a certain office at 10, Red Lion Court, Fleet Street, in the City of London, unlawfully did open, keep, and use the said office for the purpose of money being received by her and on her behalf as the consideration for undertakings to pay thereafter money on events relating to horse-races.

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The defendant had been proceeded against summarily for the alleged offence under 16 & 17 Vict. c. 119, ss. 1, 3 (1), and had, pursuant to s. 17 of 42 & 43 Vict. c. 49, claimed to be tried by a jury.

The defendant was proved to be the occupier of an office at 10, Red Lion Court, Fleet Street, and to be the registered proprietor of a newspaper called *Sporting Luck*, which was published weekly at that office. It was also proved that she personally took some part in the management, but was assisted by her husband and others.

Each number of the newspaper, which was sold at the price of one penny, contained a notice of what was called a "coupon competition," and a sheet of "coupons" or blank spaces in which the competitor filled in his guesses of the result of the horse-race or other future event which was the subject of the competition.

The last page of each number of the newspaper contained the conditions of the competition, of which conditions the material were as follows:—

"You can send in as many coupons as you think fit, but only one free coupon is allowed to be sent in by any one competitor.

"Cash must accompany each batch of coupons, and, if not sent, the coupons will be disqualified.

"If more than one succeed in securing the prize, the money offered will be equally divided.

"Only No. 1 coupon in the sheet of coupons is allowed to be used free of charge. This coupon can be filled up and

(1) By s. 1 of the Betting Act, 1853, "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner occupier keeper or person as aforesaid as and for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race."

despatched to us, and will be accepted for competition without any charges or fee being sent with it."

"If subscribers desire to make more than one attempt, any number of extra coupons can be filled up if one penny stamp is forwarded with each of these coupons, and thus, if 49 different attempts are made, and 49 of the lines in our coupon sheet are filled up, 4*s*. must be remitted."

Copies of the paper of March 23, March 30, June 15, and September 7 were put in evidence. The events the subject of the competition varied every week, but in each case between March and June the events were horse-races. The prizes also varied, being usually 1000*l*., and sometimes 3000*l*. The subject of the competition in the issue of March 23, which may be taken as an illustration of the nature of the competitions generally, was the placing of the first, second, third, and fourth horses in the Lincoln Handicap, then about to be run on March 27, and in respect of which competition a sum of 3000*l*. was offered for division among the successful competitors; and it was provided that if the first, second, third, and fourth horses were not named the 3000*l*. would be divided between those placing the first, second, and third.

It was proved that a large number of persons every week sent in coupons filled up in accordance with the conditions of the coupon competitions and sent remittances of money, and that large sums were so received by the defendant, and large sums were paid away by her in respect of the so-called prizes. One witness proved the receipt by himself of 1000*l*., being successful in one of sixty-eight coupons which he had sent in, and in respect of which he had paid 5*s*. 6*d*.

Special arrangements were made by the Post Office for the delivery of letters at the defendant's office on Tuesday mornings, and on those days there were usually twenty-two to twenty-three sacks of letters delivered. Most of these were marked outside "Competition," and the business of dealing with the coupons and remittances requires a much larger staff than would be required merely for the sale and publication of the said newspaper.

Large sums were paid by the defendant to her banking

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account every week, the total sum so paid in for the year 1900 to the month of June being proved to be 63,000*l.*; but this would include sums received in respect of the newspaper other than sums received with coupons.

In the newspaper of September 7 it was stated that 46,000*l.* had been paid away in prizes since January.

Counsel for the prosecution contended that the use of the office for the receipt of the money paid by the so-called competitors in these competitions was a contravention of the second part of s. 1 of 16 & 17 Vict. c. 119. He admitted that the facts of the case were identical with those proved in *Sagar* v. *Stoddart* (1), but contended that that decision was wrong, or only to be accounted for by the fact that in that case there had been a finding of the alderman acquitting the defendant. He stated that both sides had expressed a wish when before the magistrate in the present case that the decision in *Sagar* v. *Stoddart* (1) might be reconsidered in the Court for Crown Cases Reserved. He relied on *Hart* v. *Hay Nisbet & Co.* (2)

Counsel for the defendant said the facts were not disputed. He relied on *Sagar* v. *Stoddart* (1), and contended that the statute did not apply to a receipt of money unless the transaction was a bet, and that in this case there was no bet.

The judge held that, if the money sent by the competitors with their coupons to the office (being all the pennies other than those which they paid for the newspaper) was the consideration for the promise by the defendant to pay the so-called prizes, depending as they did upon the events of horse-races, the case came within the statute, and he asked counsel on each side whether they desired him to leave any question of fact to the jury. Neither counsel did so, and counsel for the defendant said that he would not ask the jury to find that the money received with the coupons was not the consideration for the promise to pay the prizes.

The judge directed the jury that upon the facts proved, which were not disputed, the defendant had contravened the statute,

(1) [1895] 2 Q. B. 474. (2) (1900) 37 Sc. L. R. 652.

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and the jury on that direction found the defendant guilty. Being asked to state a case for the Court for Crown Cases Reserved, the judge agreed to do so solely in deference to the opinion of the judges as reported in *Sagar* v. *Stoddart*. (1) For himself, he entirely agreed with the views of the Scottish judges in *Hart* v. *Hay Nisbet & Co.* (2) He also thought that if it was necessary that the promise or agreement to pay money referred to in the Act should be an agreement by way of wagering these agreements in fact were so.

The jury were to be taken to have found as a fact that the money received by the defendant at the office in respect of the coupons was received as the consideration for her promise to pay the prizes according to the terms set out in the said newspaper.

The question for the Court was whether the direction to the jury was right.

Joseph Walton, Q.C., and *Kershaw*, for the defendant. It must be conceded that the transactions for the purposes of which the defendant's office was kept would literally come within the words of the section. But the language of the section must not be read in its widest sense; having regard to the general purview of the Act, it must be read as confined to betting transactions. The Act was aimed at the suppression of betting houses. That is its title. Then the preamble recites the mischief that has arisen from the opening of betting houses. And s. 7 prohibits the advertising of houses as used "for the purpose of making bets or wagers in the manner aforesaid or for the purpose of exhibiting lists for betting," or with intent to induce persons to resort there "for the purpose of making bets or wagers in the manner aforesaid." It is reasonable to assume that the class of transactions which were aimed at in this section was coextensive with those aimed at in s. 1. In *Reg.* v. *Hobbs* (3), where the defendant's house was used for the sale of tickets for a sweepstakes on a horse-race, it was held that s. 1 did not apply. Lord Russell of Killowen C.J. in his

(1) [1895] 2 Q. B. 474. (2) 37 Sc. L. R. 652.
(3) [1898] 2 Q. B. 647.

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judgment observed: "If one looks at the rest of that Act . . . . it becomes clear that the Act was not intended to deal with transactions of this kind, but with betting pure and simple." Then if that was the intention of the Legislature, the present case is not one of those at which the Act was aimed. The transactions for which the defendant used the office were not in the nature of bets. As was pointed out by Hawkins J. in *Carlill* v. *Carbolic Smoke Ball Co.* (1) "it is essential to a wagering contract that each party may under it either win or lose." And that is not the case here; for the competitor having paid his penny gets what he paid it for, namely, the right to make a guess. His position is that he may win, but he cannot lose. On the other hand, the newspaper proprietor cannot win—as the result of the race. He has sold an obligation and been paid for it, and that obligation he will have to discharge whatever the result of the race may be. The promise is not to pay on the event of the horse-race, but on the event of the competitors' guessing. That is the primary contingency upon which the prize becomes payable. The case of *Caminada* v. *Hulton* (2) supports the defendant's contention. The facts of that case were the same as the present, except that there were no extra coupons, as there are here. There the consideration for the competitors' penny was partly the newspaper itself, but it was also partly the chance of winning the prize, and yet it was held that the case did not come within the Act. In *Sagar* v. *Stoddart* (3) there were, as here, a number of coupons in each copy of the newspaper—one free, and the rest having to be paid for extra. The Court held that the case did not come within the Act. That case is on all fours with the present. In *Reg.* v. *Hobbs* (4) it was held that the subscriptions to a sweepstakes were not moneys payable on the contingency of or relating to a horse-race, but on the contingency of the drawing of the sweepstakes. The case of *Hart* v. *Hay Nisbet & Co.* (5) is against the defendant. There, upon facts identical with the present, the Scottish Court held that the case was within the

(1) [1892] 2 Q. B. 484, at p. 491.
(2) (1891) 60 L. J. (M.C.) 116.
(3) [1895] 2 Q. B. 474.
(4) [1898] 2 Q. B. 647.
(5) 37 Sc. L. R. 652.

Act, and that the respondents were liable to be convicted. But that case was wrongly decided.

Avory and *Mackay*, for the Crown, were not called upon.

LORD ALVERSTONE C.J. In this case the defendant was convicted under s. 1 of the Betting Act, 1853, which provides that "No house . . . . shall be . . . . kept or used . . . . for the purpose of any money . . . . being received by or on behalf of such . . . . keeper . . . . as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race." The facts, which are not in dispute, are that the defendant having issued the newspaper, which contained one free coupon, allowed persons to send in extra coupons, or extra choices, on payment of a penny for each choice. It is found as a fact, for the purpose of our decision, that the money received by the defendant at the office in respect of the coupons was received as the consideration for her promise to pay the prizes according to the terms set out in the newspaper, the prizes being dependent on the competitors filling up the coupons correctly with the names of the winners of a horse-race. It cannot, I think, be denied that the transaction comes within the precise words of the statute. But it is said by Mr. Walton that we are to put some limited construction on those words, and that unless we think that the transaction amounts to a bet this conviction ought not to stand.

In my view we ought not to put a limited construction on those words. I have no doubt in my own mind that the framers of the statute thought that there might be some transactions, which might not strictly be called bets, and yet would involve the promise of individuals to pay a sum of money on an event or contingency relating to a horse-race; and, in my opinion, we ought not to decline to give effect to plain words when the same section mentions both betting and also these other transactions, even assuming that there is any foundation for the argument that the transaction in question is something different from a bet. Speaking for myself, I am not able to see

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the distinction, for the purposes of this section, between the transaction with which we have to deal and ordinary betting. The person who pays the extra pence does so because the person to whom the money is paid comes under a promise to pay a certain sum if the horse named by the person sending in the coupons wins the race. That seems to me to fulfil all the conditions which go to make up a bet. I do not think we can give effect to Mr. Walton's very refined argument that the obligation to pay the money depends upon the correctness of the guessing. We were pressed with the decision of *Sagar* v. *Stoddart* (1), but in my opinion it cannot be regarded as an authority against the view I am now taking. I agree that it would have been perfectly possible for the alderman who decided the questions of fact in that case to have drawn the same conclusion as the jury drew here, with reference to the consideration for which the money was received by the defendant; but he did not draw that conclusion. And that is sufficient to distinguish that case from the present. I read the judgment of Wright J. in that case as reserving for further consideration the express question which has arisen here. With regard to *Reg.* v. *Hobbs* (2), I agree that there are dicta of great authority in that case which go to support the present defendant's contention. But there is a broad distinction between the two cases. There was in that case no promise by the defendant to pay any money at all. He was only the custodian of money subscribed by other people. He himself came under no personal promise to pay. The case of *Caminada* v. *Hulton* (3) is distinguishable on the ground that primâ facie the consideration for which the purchaser of the newspaper paid his money was the newspaper itself, and there was no finding that it was in fact paid for the purpose of getting the benefit of the coupon.

Looking at the present case as a whole, I am clearly of opinion that there was upon the facts found a direct infringement of the language of the statute, and that even if the argument could prevail, that the transaction could not properly be regarded as a bet, still the offence is complete.

(1) [1895] 2 Q. B. 474. (2) [1898] 2 Q. B. 647.
(3) 60 L. J. (M.C.) 116.

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WILLS J. I am of the same opinion. I think what has been done here falls within the express words of s. 1. The only reason that has been suggested for giving to those words a limited construction, excluding everything from them which would naturally fall under them except the case of ordinary betting, appears to be that in a certain other section, as to which there is in the nature of things no particular reason why its provisions should not apply to all classes of transactions forbidden by s. 1, limited words are used, and they are confined to the case of houses kept for the purpose of "betting as aforesaid"; and it is therefore argued that s. 1 ought equally to be confined to betting, notwithstanding the more extended words used. I think it would be just as reasonable to turn the argument round the other way, and say that, inasmuch as in the nature of things there is no reason why houses kept for purposes prohibited by other words than those relating to actual betting should not be subjected to the same restraints as houses used for betting, therefore, when s. 7 speaks of "betting as aforesaid," it means to include all the matters mentioned in s. 1.

Further, in my opinion, this is about as clear a case of betting pure and simple as can well be conceived. In substance, what has taken place is this: For convenience of figures, I will suppose that the person who buys the coupons and backs his selection does so to the extent of 5*l.* He pays 5*l.* to the defendant, and if he is successful he receives 1000*l.*; if unsuccessful, he receives nothing. The substance of that is that, as regards the 5*l.*, the defendant becomes stakeholder of the money, and he is not to part with it until the event of the race is known. And if the buyer of the coupon is successful, although he receives 1000*l.*, he in fact wins, not 1000*l.*, but 995*l.*, and as to the 5*l.* gets a return of his stake. The amount by which he is better off than he was before the transaction is 995*l.*, and why that is not a bet of 5*l.* to 995*l.* on the event of a horse-race I confess I am quite unable to see. It is true that in this case the facts are complicated by the possibility of the 1000*l.* having to be divided among several persons. But that additional contingency does not, to my mind, affect the nature of the

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transaction. I am glad to see that the view I have expressed has received the high authority of two out of the three judges of the Scottish Court.

It seems to me, then, that on both the grounds that I have stated the defendant has been guilty of the offence charged. As to the cases which have been cited, I agree with every word that has fallen from my Lord in respect of them.

WRIGHT J. I am of the same opinion, for the reasons given by my Lord. I am not quite sure that I should be inclined to go so far as to say that for all purposes this is betting pure and simple, but in my opinion the section applies.

KENNEDY J. I also am of opinion that all that is necessary to bring the case within the section is to be found in the undisputed facts. I think, speaking for myself, that it is better not to complicate the law as expressed in the section by considerations of whether or not what was done ought to be called a bet or betting transaction. It is very difficult, as was pointed out by Hawkins J., to define with precision what is meant by a bet. All we have to do is to say whether the section covers this case, and I think it clearly does. I concur with what my Lord has said with regard to the earlier cases. I only wish to add a word with regard to the case of *Reg.* v. *Hobbs* (1), to the decision in which I was a party. I think it is clear that case proceeded upon a number of grounds, and it may be that some judges would not use exactly the same language as the late Lord Chief Justice used in all parts of the judgment. But no one can suggest that the judgment itself was not right. The substance of the decision was that the words of the section were not complied with because, first, the person who was there prosecuted was not a person who had entered into any contractual liability towards the subscribers; and, secondly, that the contingency upon which the money was to be paid was not a contingency relating to a horse-race, but a contingency relating to a drawing. I think that both of those are good grounds; but I do not think that the guessing

(1) [1898] 2 Q. B. 647.

in the present case can be regarded as analogous to the drawing in that case.

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PHILLIMORE J. I agree.

Conviction affirmed.

Solicitors for the Crown: *Malkin, Gaury & Co.*
Solicitor for defendant: *Stanley Kent.*

J. F. C.

In re FOUR SOLICITORS. *Ex parte* THE INCORPORATED LAW SOCIETY.

1900
Nov. 6, 21.

Solicitor — Misconduct—Administration Actions—Agreement to share Profit Costs between Solicitors who represent Different Conflicting Interests.

It is an improper practice for solicitors, acting for parties in an administration action, to share the profit costs of other solicitors introduced by them to act for other parties in the action whose interests conflict with those of the introducers' clients, and all the solicitors who engage in such a transaction are guilty of misconduct punishable by the Court.

AN application was made by T. E. Stephens that J. H. Lydall, J. F. Lydall, and H. W. Lydall, practising in partnership as solicitors, might be required to answer the matters stated in an affidavit, and that their names might be struck off the roll of the solicitors of the Supreme Court, or that they might be suspended from practising as solicitors, or that such order might be made as the Court should think right.

A similar application was made in respect of M. J. Letcher, another solicitor.

These applications were heard before the committee, appointed under the Solicitors Act, 1888 (51 & 52 Vict. c. 65), of the Incorporated Law Society, who reported (inter alia) that the respondent, J. H. Lydall, for many years past, and since 1894 the respondents, J. F. Lydall and H. W. Lydall also, introduced the respondent, M. J. Letcher, and other solicitors, to act for parties in administration actions whose interests conflicted with the interests of those for whom the

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Lydalls were acting, and that in all such cases the Lydalls received from the solicitors introduced by them agency on, or a share of, their profit costs without disclosing it, and the committee found that in so doing the respondents were guilty of misconduct within the meaning of the Solicitors Act, 1888.

The report of the committee was now brought before the Divisional Court.

A. H. Trevor, for the Incorporated Law Society.

Rawlinson, Q.C. (*Mark Romer* with him), for the applicant.

Sir E. Clarke, Q.C., and *Pickford, Q.C.* (*R. F. MacSwinney* with them), for the respondents, J. H. Lydall, J. F. Lydall, and H. W. Lydall.

C. E. Jones, for the respondent, M. J. Letcher.

[*In re Lilley* (1) was referred to by *Pickford, Q.C.*, on the question whether the Court had jurisdiction to order the applicant to pay the respondents' costs. Counsel for the respondents did not contend that the practice complained of was a proper one.]

Cur. adv. vult.

Nov. 21. The following judgment of the Court (Lord Alverstone C.J. and Kennedy J.) was read by

KENNEDY J. In this case the statutory committee of the Incorporated Law Society, charged with the investigation of certain matters of complaint made by Mr. T. E. Stephens against four solicitors practising in London—namely, three of the name of Lydall and one of the name of Letcher—have, after due inquiry, reported that they find all four guilty of professional misconduct within the meaning of the Solicitors Act, 1888. The matter has now been brought before this Court by the committee in the usual way, and it becomes our duty to pronounce judgment upon it, after considering the report of the committee and the arguments in regard to the persons affected by it which have been addressed to us by their counsel. The correctness of the full and careful statements of fact upon which the committee base their findings is not

(1) [1892] 1 Q. B. 759.

impugned by any of the respondents in any material point, and we accept that statement. It is unnecessary to dwell upon the details of the transactions which it sets forth. They are summarized clearly and quite sufficiently for the purpose of our judgment to-day in its concluding paragraph. The committee there find that the respondent J. H. Lydall for many years past—and since 1894 the respondents J. F. Lydall and H. W. Lydall also—introduced the respondent M. J. Letcher and other solicitors to act for parties in administration actions, whose interests conflicted with those of the parties for whom the Lydalls were acting, and that in all such cases the respondents received from the solicitors introduced by them agency on, or a share of, their profit costs without disclosing the fact. In our judgment, where solicitors represent conflicting interests in litigious proceedings of any kind, any arrangement or understanding or practice whereby a share of profit, whether called "agency" or by any other name, is paid by one of the solicitors to another, is wrong in principle and fraught with risks to the welfare of clients and to the administration of justice. It must not infrequently involve a temptation to him who receives a share of his opponent's profit to neglect, if not to sacrifice, the true interest of his client, where the opponent is taking steps which make costs for the common gain, according to such a practice, of both solicitors. It cannot be right that those who are paid to guard conflicting interests should enter into such pecuniary relations with each other as make it profitable to the legal representative of one of the interests to acquiesce, if not to assist, in needless and wasteful proceedings on the part of the representative of another interest. The temptation may be resisted, or the Court may effectually intervene, and no harm may result; but the agreement or practice which creates such a temptation ought not to find a place in the work of a great and honourable profession. But whilst, in our judgment, the relation which such an agreement or practice produces between solicitors entrusted with conflicting interests is altogether and in itself objectionable and indefensible, the matter appears to us to assume a much more serious aspect, both practically and morally, if the agreement or practice is not

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disclosed; and this the committee find to be the case here. The Court and its officers are misled, and the corrective force of its supervision is impaired. The Court is kept in ignorance of the fact that proceedings, which it rightly requires and assumes to be directed by independent and disinterested advice, may be dictated by a league of persons who oppose only in name and in appearance, and not in fact. One of our colleagues in the Chancery Division, in his judgment in *Stephens* v. *Lydall*, which is quoted in the report of the committee, has in strong terms reprobated such a practice, and called attention to evils which may result from it, especially where the interests of infants are involved in the litigation; and in the present case the committee of the Incorporated Law Society, after a careful examination of the facts, have found that the respondents, in carrying on this practice of undisclosed profit-sharing with solicitors who represented conflicting interests, have been guilty of professional misconduct. It is now our duty, and it is a painful duty, to say that we emphatically indorse the grave censure which that finding involves. Having come to this conclusion we have anxiously considered how, in the exercise of our disciplinary powers, we ought to deal with these respondents. We have decided to take a course which may perhaps seem to some to err on the side of clemency. In any case, before stating the considerations of mitigation which have helped to guide us, we feel it to be our duty to point out (although we earnestly hope that the warning is not needed) that if professional misconduct such as that of which these respondents have been found guilty is proved to have taken place after this public condemnation of it by this Court, one of the principal matters of mitigation will not then exist. This is, so far as we are aware, the first occasion on which the Court has had to consider this particular kind of professional misconduct. We are glad to find that the committee are able to say, not only that they had no proof adduced before them that the practice of which the respondents have been guilty was, as the respondents asserted, a common practice, but that, in the belief of the committee, that assertion is untrue, and no attempt was made before us to support such a contention. At

the same time we have reason to fear that there have existed in the ranks of the profession (although, as we hope, within a very limited range) a certain laxity of habit in such matters, and a readiness to do work upon a profit-sharing basis where the nature of the relative duties of the parties to the transaction makes it inherently vicious and improper. There are indications of that to which we refer in the evidence which is included in the report of the committee. Whilst this fact is of course no excuse for the respondents, and whilst, from the standpoint of the public interest, it enhances the importance of a clear and strong condemnation in this Court, it is nevertheless, in our judgment, just in dealing with these cases, which are the first, to admit it as an element of mitigation. It is not, however, the only element. We are bound, in our view, to give weight to the consideration that, while the practice complained of on the part of the two elder respondents has extended to several actions and over many years, neither in their case nor in the case of the two younger respondents has it been proved that a pecuniary mischief has resulted to a client. There is, in the case at least of some of the actions, evidence to the contrary. It would no doubt be very difficult, if not impossible, now to ascertain accurately, in such records and papers as may still exist or otherwise, the propriety or impropriety of proceedings taken in administration suits long since concluded, and paragraph 19 of the report certainly inspires some misgivings. Still the jurisdiction which we are exercising is punitive and almost penal, and in proceedings of such a nature the accused are, in our judgment, entitled in a high degree to insist upon strictness of proof. It is fair to say, further, that the committee in regard to one of the administration actions expressly find that the proceedings had been carried on quite properly, and in regard to two other actions report in effect an equally favourable conclusion. Lastly, in regard to the two younger respondents, Mr. J. F. Lydall and Mr. H. W. Lydall, we hold it to be right to consider, in mitigation of the professional misconduct of which they have been found guilty, that they are young men in their father's office who naturally would be influenced by their father's example in the conduct of

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business, not only owing to their close relationship to him, but owing also to the fact that, at the time when the elder son was admitted to the profession, the father had been practising as a solicitor for more than thirty years. In these circumstances we think that the justice of the case will be met if we make in the case of each of the two elder respondents, John Hawthorne Lydall and Mark Jameson Letcher, an order of suspension for three months, and in the case of the two younger respondents, John French Lydall and Herbert Wykeham Lydall, an order that they as well as the two first-named respondents do pay the costs of the Law Society. We make no order as to the costs of Mr. T. E. Stephens. He made a number of most grave charges against the respondents which were abandoned in the course of the inquiry; and further, in the 14th paragraph of the report, it appears that he was from time to time informed by Mr. J. H. Lydall that he was receiving as agency a share of the profit costs of Mr. Letcher and another solicitor, and that half of such share was from time to time remitted to him in letters stating the sums remitted to be a proportion of the profit of Mr. Letcher's and the other solicitor's costs respectively.

Order accordingly.

Solicitor for Incorporated Law Society: *S. P. B. Bucknill.*
Solicitors for applicant: *Lewis & Lewis.*
Solicitors for respondents: *The Respondents.*

W. A.

JAMES *v.* IVEMEY.

1900
Nov. 21.

Parliament—Franchise—Registration—Right of Freeholders of Haverfordwest to Vote for Borough of Pembroke—Reform Act, 1832 (2 & 3 *Will.* 4, *c.* 45), *s.* 2, *Sched. E—Redistribution of Seats Act*, 1885 (48 & 49 *Vict. c.* 23), *ss.* 2, 7, 11, *Scheds. I. and V.*

By the Redistribution of Seats Act, 1885, a new parliamentary borough of P. and H. was created, consisting of the parliamentary borough of P. and the places comprised in the area of the parliamentary borough of H., and by the same Act the borough of H., which was a county of itself, ceased to return any member:—

Held, that the freeholders of the old borough of H., who had had as such a right to vote for that borough, had no right as freeholders to vote for the new borough of P. and H.

CASE stated by a revising barrister.

At a court for the revision of the lists of voters for the parliamentary borough of Pembroke and Haverfordwest, objection was taken to the name of John James being retained in the parliamentary list of voters for the said borough intituled "List of the persons entitled to be registered as parliamentary voters for the parliamentary borough of Pembroke and Haverfordwest in respect of any right reserved by ss. 31 and 33 of the Reform Act, 1832."

The name of John James appeared on the list as under:—

Name of the Voter in full, Surname being first.	Place of Abode.	Nature of Qualification.	Description of Qualifying Property.
James, John . . .	St. Martin's Crescent.	Freehold house.	Fountain Row and Pew Street.

The town of Haverfordwest is a county of itself, so constituted by Royal charter and statute, and possessing a separate court of quarter sessions.

Before the Reform Act, 1832, the county of the town of Haverfordwest returned a member to Parliament, and the privilege was not participated in by any contributory place;

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but by s. 8 and Sched. E of that Act the towns of Fishguard and Narberth were given a share in the election of the member for Haverfordwest.

By the same section and schedule certain places were given a share in the election of the member for the borough of Pembroke, at that time entirely distinct from Haverfordwest.

By the Redistribution of Seats Act, 1885, a new borough was constituted called the borough of Pembroke and Haverfordwest, and comprising the places till then included in the distinct constituencies of Pembroke and of Haverfordwest.

Freeholders in the town and county of Haverfordwest had the right to vote in the election of a member for Haverfordwest before the passing of the Reform Act, 1832, and have continued to exercise that right without interruption or objection down to the present year.

The said John James became a freeholder of the county of the town of Haverfordwest before the passing of the Redistribution of Seats Act, 1885, but several other persons whose names appeared in the list entitled as above had been admitted to vote as freeholders of the county of the town of Haverfordwest since the passing of that Act.

It was agreed that the decision of the revising barrister should govern the cases of all voters whose names appeared on, and of all persons claiming to have their names inserted in, the lists of parliamentary electors in respect of freehold qualifications in certain parishes within the town and county of Haverfordwest.

It was contended in support of the objection that, by s. 31 of the Reform Act, 1832, the rights of the freeholders of the county of the town of Haverfordwest to vote in the election of a member for the county of the town of Haverfordwest were preserved, and that the Act did not interfere with the right of the county of the town to be represented in Parliament except that by s. 8 and Sched. E the adjacent places of Narberth and Fishguard were admitted to share in the election of the member for Haverfordwest, and, together with the county of Haverfordwest, thenceforth constituted the Haverfordwest district or parliamentary borough of Haverfordwest. That by

s. 2 and the 1st schedule of the Redistribution of Seats Act, 1885, the Haverfordwest district ceased to return any member, and the county of the town of Haverfordwest was for the purpose of parliamentary elections included in the county at large of Pembroke. That by s. 17 of the same Act the rights of freeholders in the area of what was formerly the county of the town of Haverfordwest were preserved for the purpose of enabling them to vote in the election of the member for the county of Pembroke at large in respect of the same qualifications which formerly enabled them to vote in the election of a member for the abolished parliamentary borough. That by s. 7 of the Redistribution of Seats Act, 1885, the parliamentary borough of Pembroke was for all purposes of and relating to parliamentary elections enlarged so as to comprise the places comprised in the abolished parliamentary borough of Haverfordwest, and by s. 11 the law relating to the elections for the parliamentary borough of Pembroke was made to apply as if the places comprised in the area of the former parliamentary borough of Haverfordwest were named in the Reform Act of 1832 as places sharing in the election of a member for Pembroke, and the new enlarged borough received the name of Pembroke and Haverfordwest. That by the law relating to the elections for the parliamentary borough of Pembroke, freeholders had no right to vote for the election of the member for the borough, because Pembroke never was, like Haverfordwest or Southampton, a county of a town or of a city like Bristol, Exeter, and Norwich, and therefore the freeholders who used to have a right to vote for the member for the borough of Haverfordwest district were not given any right to vote for the borough of Pembroke, but had instead a right to vote for the member for the county of Pembroke. That ss. 31 and 33 of the Reform Act, 1832, were totally inapplicable to give freeholders any right to vote in the election of the member for the borough of Pembroke, because such member serves not merely for the county of the town of Haverfordwest and places sharing therewith, but he serves for the whole new borough which is Pembroke and places sharing with Pembroke.

It was contended in support of the claim that Haverfordwest

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as a county could not be distinguished from Haverfordwest as a place. That the effect of the Redistribution of Seats Act, 1885, was to transfer Haverfordwest with its contributory places of Fishguard and Narberth and all its franchise (including freeholders) to the new borough of Pembroke and Haverfordwest, and that no section of that Act dealt with the freeholders of Haverfordwest as a separate class of voters. That the disfranchisement of the parliamentary borough of Haverfordwest as a separate political entity and its junction with the parliamentary borough of Pembroke in the new borough was sufficiently effected by the 1st paragraph of s. 2, the first part of the 1st schedule, s. 7, and the 5th schedule of the Redistribution of Seats Act, 1885. That the 2nd paragraph of s. 2, and the second part of the 1st schedule of the said Act, made no distinction between Haverfordwest and the other counties of towns and cities mentioned therein (which have become entirely parts of certain counties as set out in the 7th schedule), and no distinction between freeholder and occupation voters in any of the several towns and cities, and that in so far as this section was intended to apply to Haverfordwest (which has not been made part of a county and is not included in the 7th schedule) it is inconsistent with the later sections of the same Act (s. 7, Sched. V., s. 11), and is therefore of no effect. That ss. 7 and 11 of the Redistribution of Seats Act, 1885, and Sched. V. expressly include in the new borough of Pembroke and Haverfordwest the old parliamentary borough of Haverfordwest with all the franchises theretofore exercised in Haverfordwest itself. That if Haverfordwest had been named in the Act of 1832 as sharing with Pembroke in the election of a member, its freeholders would have been entitled to the protection of ss. 31 and 33 of that Act, these sections not being limited to constituencies including nothing besides a town and county, and Haverfordwest then sharing its representation with two other places. That s. 17 of the Act of 1885 applied only to the question of time for the first registration, and operated as far as the Haverfordwest freeholders were concerned to enable them for the purpose of voting for the new borough to have credit for the time of their holding their qualifications in the

old borough. That this section applied to all classes of voters, and did not operate to preserve any right of Haverfordwest to vote in the county of Pembroke. It was alternatively contended that, even if the contentions of the objector were well founded, the said John James, having been on the register prior to 1885, was entitled to remain on under s. 17 of the Redistribution of Seats Act, 1885, and s. 10 of the Representation of the People Act, 1884.

The revising barrister upheld the objection and expunged the name of John James from the list, but at his request he stated this case for the opinion of the Court.

Dickens, Q.C. (*Lewis Coward* with him), for the appellant. The appellant's right to vote for the borough of Haverfordwest in respect of his freehold qualification was expressly preserved by s. 31 of the Reform Act, 1832. (1)

(1) By the Reform Act, 1832 (2 & 3 Will. 4, c. 45), s. 8, "And be it enacted that each of the places named in the first column of the Sched. E to this Act annexed shall have a share in the election of a member to serve in all future Parliaments for the shire-town or borough which is mentioned in conjunction therewith and named in the second column of the said Sched. E."

By s. 31, "And be it enacted that in every city or town being a county of itself in the election for which freeholders or burgage tenants either with or without any superadded qualification now have a right to vote, every such freeholder or burgage tenant shall be entitled to vote in the election of a member or members to serve in all future Parliaments for such city or town, provided he shall be duly registered . . . .: Provided . . . . that every freehold or burgage tenement which may be situate without the present limits of any such city or town being a county of itself, but within the limits of such city or town as the same shall be settled and described by the Act to be passed for that purpose as hereinbefore mentioned, shall confer the right of voting in the election of a member or members to serve in any future Parliament for such city or town in the same manner as if such freehold or burgage tenement were situate within the present limits thereof."

By Sched. E—

Places sharing in the Election of Members.	Shire-towns or principal Boroughs.	County in which such Boroughs are situated.
Narberth } sharing with . . Fishguard }	Haverfordwest .	Pembrokeshire.

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By the Redistribution of Seats Act, 1885, s. 7, and Sched. V., Haverfordwest and Pembroke are made into one borough for the purpose of parliamentary elections, and by s. 11 the law relating to elections for that joint borough is to apply as if they had been named as forming one borough in the

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By the Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23), s. 2, "From and after the end of this present Parliament the parliamentary boroughs named in the first part of the 1st schedule to this Act shall cease as boroughs to return any member.

"Each of the counties of cities and towns in the second part of the said schedule named shall for the purpose of parliamentary elections be included in the county at large named opposite thereto in that part of the said schedule."

By s. 7, "(1.) From and after the end of this present Parliament each of the parliamentary boroughs named in the 5th schedule to this Act shall for all purposes of and relating to parliamentary elections include the places and be comprised within the boundaries which are respectively specified and described in the said schedule, and shall not include the places which are either therein specified and described as excluded or are included by this Act in any other parliamentary borough.

"(2.) Where by virtue of this section any area is added to a borough, being a county of a city or of a town in which freeholders are entitled to vote for the borough, that area shall for all purposes of and relating to parliamentary elections held after the end of this present Parliament form part of the county of a city or town, and not of the county at large of which it has heretofore formed part."

By s. 11, ... "The law relating to the elections for the parliamentary borough of Pembroke shall apply as if the places comprised in the area of the present parliamentary borough of Haverfordwest were named in the Act of the session of the second and third years of King William the Fourth, chapter forty-five, as places sharing in the election of a member for Pembroke, and the borough shall be called Pembroke and Haverfordwest."

By s. 17, "Where a place in which the qualifying property of any voter is situate is changed from one parliamentary area to another, then on the occasion of the first registration of parliamentary voters which takes place after the passing of this Act such voter shall, as respects his right to have his name placed on the register and other rights of registration . . . . stand in the same position so far as circumstances admit in relation to the new area as he would have stood in if this Act had been in force before the commencement of the period of qualification, and such voter had acquired his rights under the law in force at such commencement. . . . . A place shall be deemed to be changed from one parliamentary area to another when it becomes part of a constituency of which it did not form part before the passing of this Act. . . . ."

By s. 24, "In this Act, unless the context otherwise requires— . . . . The expression 'law relating to parliamentary elections' includes all laws, customs, and enactments relating to parliamentary elections inclusive of the law respecting the qualification and registration of voters."

Reform Act, 1832. The effect of that section, therefore, is to preserve the right of the freeholders to vote, which was kept alive by s. 31 of the Reform Act, 1832. No doubt s. 31 says that the right shall be to vote for members to serve in future Parliaments "for such city or town," but the member does not serve any the less "for such city or town" because he serves for that city or town plus some other town or place. The Act of 1832 contemplated that the areas of the boroughs might be enlarged.

[LORD ALVERSTONE C.J. Why should freeholders of Haverfordwest have rights to vote for the borough of Pembroke, while the freeholders of Pembroke have no such right?]

By the first part of the 1st schedule—

"Boroughs to cease as such.

England.

Borough.	County.
Haverfordwest (district).	Pembroke.

By the second part of the 1st schedule—

"Each county of a city or town named below shall for the purpose of parliamentary elections be included in the county at large placed opposite to it.

County of City or Town.	County at large in which it is to be included.
Haverfordwest.	Pembroke.

By the 5th schedule—

"Contents and Boundaries of Boroughs with altered Boundaries.

England.

Name of Parliamentary Borough.	Contents and Boundaries.
Pembroke.	The present parliamentary borough of Pembroke and the places comprised in the area of the present parliamentary borough of Haverfordwest.

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Because the freeholders of Haverfordwest always possessed the right as freeholders, and the freeholders of Pembroke did not. No doubt s. 2 of the Redistribution of Seats Act, 1885, and the second part of Sched. I. provide that the county of the town of Haverfordwest shall be included for the purpose of parliamentary elections in the county of Pembroke; but that is not of itself sufficient to take away the rights of the freeholders to vote for the borough. There must be express words to take away a franchise, and the effect of that provision is only to give the freeholders a double franchise to vote for the county and the borough. It does not operate to deprive them of the latter vote. Sect. 17 of the Act of 1885 is only a temporary provision and has no application. Sect. 24 defines the law relating to parliamentary elections as including the law respecting qualification and registration of voters.

Bray, Q.C., and *S. G. Lushington* were not called upon to argue for the respondent.

LORD ALVERSTONE C.J. When the sections on which the question arises are carefully examined, I think it is reasonably clear that the decision of the revising barrister was right.

The case is of importance, because we are not dealing here only with the claim of the particular appellant to vote, but our decision is to govern the cases of all voters whose names appear on, and of all persons claiming to have their names on, the list of parliamentary electors in respect of freehold qualifications in certain parishes in the borough of Pembroke. It is a claim on the part of the freeholders in Haverfordwest under the Act of 1832 to exercise in the borough of Pembroke, not an occupation vote or an ordinary borough vote, but to exercise a freehold vote—that is to say, to vote for the borough of Pembroke in respect of the possession of freeholds in the old county of the borough of Haverfordwest. At the time of the passing of the Act of 1832 Haverfordwest was a city or town which was a county of itself, and it is taken (and it is not disputed by the respondents) that the freeholders in that town or county were then entitled to vote for the borough of Haverfordwest. I assent to the argument that the effect of the Act of 1832 and

the provisions of s. 31 read together with the provisions of ss. 8 and 9, and the schedules therein referred to, was to bring in for the purposes of voting for the town or county of Haverfordwest the two districts of Narberth and Fishguard, and to make Narberth and Fishguard part of the town or county of Haverfordwest, being a county of itself. The proviso to s. 31, in my opinion, makes this clear. It provides "that every freehold or burgage tenement which may be situate without the present limits"—that is, without the then limits of Haverfordwest—"being a county of itself, but within the limits of such city or town, as the same shall be settled and described by the Act to be passed for that purpose as hereinbefore mentioned, shall confer the right of voting in the election of a member or members to serve in any future Parliament for such city or town in the same manner as if such freehold or burgage tenement were situate within the present limits thereof." Therefore, I assent to the view that, after the passing of the Act of 1832 and up to the passing of the Act of 1885, the freeholders in Haverfordwest (and I should have thought myself certainly the freeholders in Narberth and Fishguard also) were entitled to their vote by virtue of their freehold.

The important question in this case is whether those rights are continued and saved by the Redistribution of Seats Act, 1885; and if Mr. Dickens could have shewn that either the Act is silent on the point, or that it had not altered the character of the borough of Haverfordwest as extended by the Act of 1832, I think he would have made good his contention. But when we look at the Act of 1885, not only has the matter been dealt with, but I think it is reasonably clear that it has been dealt with from the point of view of not preserving any longer to Haverfordwest the privileges which it would have had if it had remained a county of itself, and that Haverfordwest, both for borough purposes and for county purposes, has become part on the one hand of the borough of Pembroke, and on the other hand of the county of Pembroke, for the purpose of a person having a vote.

The 1st section of the Act of 1885 which is material is s. 2: "From and after the end of this present Parliament

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the parliamentary boroughs named in the first part of the First Schedule to this Act shall cease as boroughs to return any member. Each of the counties of cities and towns in the second part of the said schedule named shall for the purpose of parliamentary elections be included in the county at large named opposite thereto in that part of the said schedule." And on looking at the second part of the 1st schedule, we find that the county of the city or town of Haverfordwest is to be included in the county of Pembroke "for the purpose of parliamentary elections." Now comes s. 7, which, taken with s. 11, is, in my opinion, the important and governing section. The 1st sub-section of s. 7 is as follows: "From and after the end of this present Parliament each of the parliamentary boroughs named in the Fifth Schedule to this Act shall for all purposes of and relating to parliamentary elections include the places and be comprised within the boundaries which are respectively specified and described in the said schedule, and shall not include the places which are either therein specified and described as excluded, or are included by this Act in any other parliamentary borough." Turning to the 5th schedule, it appears that the borough of Pembroke includes "the present parliamentary borough of Pembroke and the places comprised in the area of the present parliamentary borough of Haverfordwest." Therefore, if there were nothing else, the effect of that legislation is to take the area which was previously the county of the borough of Haverfordwest and to put it into the borough of Pembroke.

Now, if it could be shewn that the position of Haverfordwest as a county of itself was intended still to be maintained, or if, in other words, Pembroke had been added to the county of Haverfordwest in the same way as Narberth and Fishguard were added to it by the Act of 1832, I think Mr. Dickens's argument would be unanswerable. As far as I have gone, it seems clear that the Act meant that Haverfordwest should be added to Pembroke, and not that Pembroke should be added to Haverfordwest. But sub-s. 2 of s. 7 I think makes it plain that the point was not overlooked. That sub-section provides: "Where, by virtue of this section, any area is added to a

borough being a county of a city, or of a town in which freeholders are entitled to vote for the borough, that area shall, for all purposes of and relating to parliamentary elections held after the end of this present Parliament, form part of the county of a city or town, and not of the county at large of which it has heretofore formed part." As I have said, if Pembroke had been added to Haverfordwest, I think the appellant could then claim the benefit of sub-s. 2 of s. 7. I believe that there are towns still in the United Kingdom which since the Act of 1885 have been counties in themselves, and to which sub-s. 2 of s. 7 applies: whether I am right or not in that is immaterial, because it is quite clear that that was the case which the Act of Parliament contemplated.

Now, in order to get rid of any suggestion that this case has been overlooked, this particular district was dealt with by the 2nd clause of s. 11: "The law relating to the elections for the parliamentary borough of Pembroke shall apply as if the places comprised in the area of the present parliamentary borough of Haverfordwest were named in the Act of the session of the second and third years of the reign of King William the Fourth, chapter forty-five, as places sharing in the election of a member for Pembroke, and the borough shall be called Pembroke and Haverfordwest." In my opinion, to continue to Haverfordwest the benefit given by s. 7, sub-s. 2, it would have at least have been necessary to say, "and the borough of Pembroke and Haverfordwest shall be deemed to be a county in itself"—which we do not find. I am clearly of opinion that the effect of this legislation was to add Haverfordwest to Pembroke, and not to add Pembroke to the old borough of Haverfordwest, which was a county of itself.

Sect. 24 shews that no limited meaning is to be put upon the words "the law relating to parliamentary elections," because it is expressly said to include "the law respecting the qualification and registration of voters." I agree with Mr. Dickens that s. 17 does not tell against him, but I do not think it can be used in his favour. It was, in my opinion, a purely temporary section for the purpose of enabling any

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qualified voter to put together the qualification that had arisen from the broken period in the borough which was being abolished, and add it on in point of time to the qualification for a vote for the new borough or county. It applies to both. I read it as a temporary section enabling the two broken periods of time to be put together for the purpose of the statutory qualification.

I will only say in conclusion that of course I should not have hesitated to decide that freehold voters in this area could now acquire in the borough a vote which no other borough occupier in other than boroughs which are counties themselves could have obtained, if the language of the Act admitted of that construction; but in my judgment, when the sections are carefully examined, any difficulty disappears, and I think the revising barrister in this case was perfectly right.

WILLS and WRIGHT JJ. concurred.

Appeal dismissed.

Solicitors for appellant: *Ayrton, Biscoe & Barclay.*
Solicitors for respondent: *Russell Cooke & Co.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

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Nov. 27.

MONTI *v.* BARNES.

Fixtures—Mortgagor and Mortgagee—"Dog Grates" Substituted for Fixed Grates—Intention to Improve Inheritance.

The mortgagor of a house, subsequently to the mortgage, removed the ordinary fixed grates from various rooms in the house and substituted for them "dog grates," which were of considerable weight, but were not physically attached to the structure of the house in any way:—

Held, that under the circumstances the true inference was that the mortgagor placed the dog grates in the house with the object of improving the inheritance, and that they were therefore fixtures which passed to the mortgagee.

APPEAL from the judgment of Bigham J. in an action tried before him without a jury.

The defendant in the action set up a counter-claim for the return of eleven "dog grates" wrongfully detained by the plaintiff or their value.

The owner in fee of a house at Windsor mortgaged it in 1890, and in 1893 the mortgage was transferred to the defendant. The mortgagor subsequently in the year 1893 sold the equity of redemption in the house, and also the furniture, fittings, and effects therein to the plaintiff. In 1898 the defendant foreclosed the mortgage and became owner in fee of the premises. After the mortgage was effected and prior to its transfer to the defendant, the mortgagor removed from various rooms in the house the ordinary fixed grates which were there, and substituted for them eleven grates of the kind known as "dog grates," which were of considerable weight, but were not affixed in any way to the structure of the house. The plaintiff had removed these grates. The learned judge held that the dog grates were placed in the house by the mortgagor for the improvement of the inheritance, and with the intention that they should become part of the freehold, and consequently they were fixtures. He accordingly gave judgment for the defendant on the counter-claim.

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H. Reed, Q.C., and *Cannot*, for the plaintiff. The dog grates not being in any way affixed to the structure of the house, the presumption is that they were not intended to be annexed to the freehold, and therefore were not fixtures.

[They cited *Hobson* v. *Gorringe* (1); *Holland* v. *Hodgson* (2); *Climie* v. *Wood* (3); *Norton* v. *Dashwood* (4); *Viscount Hill* v. *Bullock*. (5)]

Rufus Isaacs, Q.C., and *J. W. McCarthy*, for the defendant, were not called upon to argue.

A. L. SMITH M.R. A question which arises in this case is whether, as between mortgagor and mortgagee, certain dog grates were fixtures or mere personal chattels. There were in the house which was the subject of the mortgage the ordinary fixed grates. The mortgagor after the mortgage removed a number of these, and substituted for them dog grates which are of considerable weight. The question, as I have said, is whether they in this case became fixtures or remained chattels. It is urged for the plaintiff that as they were not affixed in any way to the freehold, this factor shewed that they remained chattels. That circumstance primâ facie appears to raise a little difficulty, but it will be seen, on consideration of the cases, and particularly of what Blackburn J. said in *Holland* v. *Hodgson* (6), that it is not in all cases necessary that the article should be actually affixed to the freehold in order that it may become a fixture. That learned judge says: "There is no doubt that the general maxim of the law is that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, namely the degree of annexation and the object of the annexation. When the article in question is no further attached to the land than by its own weight, it is generally to be considered

(1) [1897] 1 Ch. 182.
(2) (1872) L. R. 7 C. P 328.
(3) (1869) L. R. 4 Ex. 328.
(4) [1896] 2 Ch. 497.
(5) [1897] 2 Ch. 482.
(6) L. R. 7 C. P. 328, at p. 334.

a mere chattel: see *Wiltshear* v. *Cottrell* (1) and the cases there cited. But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land: see *D'Eyncourt* v. *Gregory*. (2)" He then proceeds to take as instances the case of blocks of stone placed one on the top of another without any mortar or cement for the purpose of forming a dry stone wall, which nevertheless would become fixtures, and that of stones in a stone-mason's yard, which would not. Applying these principles to the present case, we have here the fact, first, that the articles in question are of considerable weight; and, as regards the intention with which the mortgagor placed the dog grates in the house, it is obvious that he could not have intended that the house should be without grates; and I have no doubt that the dog grates were put in to fill the place of the old fixed grates, which he took out, and to pass with the inheritance. The question which has to be considered in such a case is whether, having regard to the character of the article and the circumstances of the particular case, the article in question was intended to be annexed to the inheritance or to continue a mere chattel, and not to become part of the freehold. The learned judge has held that in the circumstances of this case these dog grates were substituted for the old fixed grates with the former intention, and not only am I unable to say that he was wrong in that conclusion, but I agree with him.

COLLINS L.J. I am of the same opinion. The question whether the things in dispute were fixtures is a mixed question of law and fact, depending upon the intention with which they must be taken to have been placed in the house; upon whether they were put there as a permanent improvement of the inheritance, or merely for a temporary purpose, to be removed whenever the person who placed them there thought fit. The circumstances mainly to be considered as indicating the intention are stated by Blackburn J., in delivering the judgment of the Exchequer Chamber in *Holland* v. *Hodgson* (3), to be the degree of annexation and the object of the annexation. With

(1) (1853) 1 E. & B. 674. (2) (1866) L. R. 3 Eq. 382.
(3) L. R. 7 C. P. 328.

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regard to the latter, it is obvious that a most material consideration is the character in which a person places the article in question on the land. Here we are dealing with a case of mortgagor and mortgagee, which in this connection differs widely from that of landlord and tenant. A mortgagor bringing an article on to the mortgaged premises, although it may be after the mortgage, would generally not regard the premises as belonging to any one but himself, and would therefore be the more likely to intend the article to be for the improvement of the property from which he does not contemplate being ousted. This appears to me to be a very important consideration to be borne in mind when considering the object of the annexation. Then, with regard to the degree of the annexation, there was in the case of these dog grates no doubt the difficulty that there was no physical annexation; but it is clear that, as a matter of law, there may be annexation, so as to constitute a thing a fixture, by mere weight, and without any physical attachment by nails or screws or otherwise, as in the case of the movable statues, forming part of the architectural design of a building, which were the subject of the decision in *D'Eyncourt* v. *Gregory*. (1) But, in dealing with the question of annexation by mere weight, it is obvious there must be some line of division, for everything that is brought into a house rests where it is by the force of gravity. No one would say that a footstool or, I should think, fire-irons, were fixtures, but I think that dog grates resting by their own weight are capable of being treated as annexed to the freehold. That being so, one has to consider the circumstances under which they were placed in the house. Here these dog grates were substituted by a person who was the owner of the house, subject to the mortgage, for grates which were undoubtedly part of the freehold. Under these circumstances I think that the learned judge was justified in drawing the inference that they were intended by the owner to form part of the freehold and were therefore fixtures.

STIRLING L.J. I agree. The dispute whether the articles in question were fixtures or not arises between mortgagor and

(1) L. R. 3 Eq. 382.

mortgagee. The law applicable to such a case is laid down by Blackburn J. in *Holland* v. *Hodgson*. (1) He there says that the question whether a thing is a fixture must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, namely, the degree of annexation and the object of the annexation. The contention for the plaintiff really involved the proposition that some degree of physical annexation is essential, and that an object simply resting on the land by its own weight could not be said to be annexed at all. But clearly this was not the meaning of Blackburn J., for he proceeds to deal with the question in relation to articles no further attached to the land than by their own weight, and gives as an example of fixtures blocks of stone placed one on the top of another without mortar or cement for the purpose of forming a dry stone wall. He finally suggests that "perhaps the true rule is that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel." With regard to the object with which these dog grates were placed in the house, it is most material to observe that they were placed there by the mortgagor after the mortgage, and in the place of the old fixed grates which existed at the time of the mortgage. It seems to me that, if the mortgagor had removed the old grates without substituting any grates for them, he would have been guilty of waste, such as would call for the interference of the Court at the instance of the mortgagee. The question whether there is sufficient annexation to constitute a thing a fixture is one of degree. These dog grates are articles of considerable weight, and, as I have said, it is clear that there may be

(1) L. R. 7 C. P. 328.

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annexation merely by weight. With regard to the object of the annexation I think that, in the absence of evidence to the contrary, we ought under the circumstances to draw the inference that the mortgagor intended to annex these grates to the house so as to make it capable of use as a house, and so that the dog grates should be in substitution for the old grates which were clearly fixtures.

Appeal dismissed.

Solicitor for plaintiff: *M. S. Rubinstein.*
Solicitors for defendant: *Calkin, Lewis & Stokes.*

E. L.

C. A. 1900 Dec. 6, 7.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* THE LOCAL GOVERNMENT BOARD.

Poor Law—Union, Alteration of—Apportionment of Property—Annual Sums payable to Union—Poor Law Amendment Act, 1834 (4 & 5 *Will.* 4, *c.* 76), *s.* 32.

Where, on the separation of a parish from a union of which it previously formed part under the Poor Law Amendment Act, 1834, s. 32, the Local Government Board, by an order intended to be made under that section, directed that sums payable annually by the county council to the union under the Local Government Act, 1888, s. 24, sub-s. 2 (*d*), and s. 26, sub-s. 1, should be apportioned between the union and the parish in each year according to their respective rateable values for the time being:—

Held, that the Local Government Board had no power to make such an order, inasmuch as s. 32 of the Poor Law Amendment Act, 1834, contemplates a final settlement between the two bodies based on an estimate of the existing proportionate values of their respective interests in the property to be apportioned.

APPEAL from the order of a Divisional Court (Bigham and Channell JJ.) as after mentioned.

By an order of the Local Government Board, made in pursuance of s. 32 of the Poor Law Amendment Act, 1834, on August 12, 1896, the parish of Willesden was separated from the Hendon Union, of which it had previously formed a part, and by a further order of the Local Government Board dated August 13, 1896, it was ordered that the laws for the relief of

the poor in that parish should thenceforth be administered by a board of guardians.

Under the Local Government Act, 1888, s. 24, sub-s. 2 (*d*), and s. 26, sub-s. 1, the county council of Middlesex has to pay to the guardians of the Hendon Union the sums of 18*l.* and 2597*l.* in respect of each financial year ending March 31.

On December 23, 1898, the Local Government Board made an order, under s. 32 of the Poor Law Amendment Act, 1834, for the purpose of providing for the apportionment of the property and liabilities of the union at the time of the separation between the Hendon Union and the parish of Willesden. By Art. V. of that order it was provided that—"As and when the sums of 18*l.* and 2597*l.* are received by the guardians of the poor of the said Hendon Union from the county council of Middlesex, in pursuance of s. 24, sub-s. 2 (*d*), and of s. 26, sub-s. 1, of the Local Government Act, 1888, in respect of the financial year ending March 31, 1899, and in respect of each succeeding financial year, such sums shall be apportioned by the guardians of the poor of the Hendon Union between the Hendon Union and the parish of Willesden according to the respective rateable values of the union and parish for the purposes of the poor-rate, according to the valuation lists in force on the 25th day of March next preceding the financial year in respect of which the payment is made, and the guardians of the poor of the Hendon Union shall forthwith pay to the guardians of the poor of the parish of Willesden the amount so apportioned to that parish."

A rule nisi for a certiorari to bring up the order of December 23, 1898, in order that as regards Art. V. it might be quashed, was obtained on behalf of the guardians of the Hendon Union. On argument the Divisional Court discharged the rule.

Page, Q.C., and *Bartley Denniss*, for the guardians of the Hendon Union. First, the annual sums payable to the union under the Local Government Act, 1888, are not property within the meaning of s. 32 of the Poor Law Amendment Act, 1834. A sum to be paid in future is not existing property held and

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enjoyed by the union at the time of the separation. Secondly, assuming these sums in some sense to be property, the Local Government Board have not followed the provisions of the section. The property, if any, to be valued for the purposes of the section is the right to the annual sum, not the sums themselves. In the case of freehold land, the property is the land, not the rents receivable under a lease of it. Similarly in the case of an annuity. It was the duty of the Local Government Board under the section to ascertain the proportionate value to the parish and the rest of the union respectively of the property. There is no valuation in their order of the capitalised value of the annual sums. The terms of the section contemplate an ascertainment of the proportionate value as existing at the time of the separation at a certain sum, which is to be paid, or secured, by the union which retains the property to the separated parish. The section does not contemplate an order for division of the proceeds of property from time to time in fluctuating proportions dependent upon future events.

Sir R. B. Finlay, *A.-G.*, and *Sutton*, for the Local Government Board. The order of the Local Government Board can only be brought up by certiorari, if they have acted without jurisdiction. The High Court has no jurisdiction to review the exercise by the Board of their discretion: see s. 105 of the Poor Law Amendment Act, 1834. It is submitted that the annual sums payable to the guardians of the union under the Local Government Act, 1888, are clearly property within the meaning of s. 32 of the Poor Law Amendment Act, 1834: *Potter* v. *Commissioners of Inland Revenue* (1); *Jump* v. *Jump*. (2)

It is submitted further that it was competent for the Local Government Board under the terms of the section to make an order that these sums should be divided in futuro as they accrued in the proportions mentioned in the order. It is impossible to capitalise the value of the sums mentioned in the Local Government Act, 1888, s. 26, sub-s. 1, for by the express terms of the Act they are only payable until Parliament shall otherwise determine; and it might be most unfair to capitalise them on the footing that they will continue for ever. An

(1) (1854) 10 Ex. 147. (2) (1883) 8 P. D. 159.

actuary cannot estimate the chances of future legislation. The Local Government Board have by their order in effect ascertained the proportionate value of these sums to the separated parish and the union respectively as required by the section. Why is the expression "proportionate value" in the section to be confined to "then proportionate value"? Suppose, by way of illustration, that a union enjoyed an annuity charged upon some security, the value of which in futuro was doubtful, e.g., agricultural land. Why should the Local Government Board be bound under the section to take the present value of that annuity as the basis of the apportionment, the effect of which might turn out to be most unfair? It is submitted that they need not do so, if they think it the fairer way to order that the sum shall be apportioned from time to time as it accrues. It is objected that the apportionment of the sum in futuro is not to be according to a fixed basis, but according to a fluctuating standard to be ascertained in future; but the maxim "Id est certum quod certum reddi potest" applies. There is nothing in the terms of the section to compel the Local Government Board to fix the proportion by a hard and fast rule framed with reference to existing circumstances, which might work out most unfairly in the future. The proportion is fixed within the meaning of the section if a scale is fixed by which it may be determined. The mode of determining the proportionate value which may properly be applied in the case of such property as a workhouse, namely, by taking the existing value, may not be the proper mode of dealing with such annual sums as those in question. It is submitted that even in the case of a freehold property the Local Government Board would not be bound to adopt that mode. It was within the discretion of the Local Government Board to adopt the method suitable to the particular case.

R. E. Moore (*Danckwerts, Q.C.*, with him), for the parish of Willesden.

Page, Q.C., for the Hendon Union, in reply.

A. L. SMITH M.R. In my opinion the meaning of s. 32 of the Poor Law Amendment Act, 1834, is that the Commissioners

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(for whom the Local Government Board are now substituted) shall ascertain the proportionate value of the property in question to the various parishes of the union at the time when the separation of the parish takes place, the intention being that there shall then be a complete division of property between the rest of the union and that parish once for all, and that thenceforth they shall have nothing more to do with one another. The section speaks of "workhouses or other property." One knows very well that parishes frequently owned parish land, and it was probably such land which the Legislature had in view, when in 1834 they spoke of "other property." But another kind of property came into existence under the Local Government Act, 1888, which the Legislature could not have had specifically in contemplation, when they passed the Act of 1834. Under s. 26 of the Act of 1888 there became payable by the county council to the unions in their county what I may call for short Parliamentary annuities of a certain amount "until Parliament otherwise determine." These last words really add nothing to the effect of the section, for in any case the provision would necessarily have been subject to alteration by Parliament. As long as the original Hendon Union remained undivided, the ratepayers of the parish of Willesden participated in the benefit of this annuity. When the separation takes place, another state of things arises: the parish of Willesden and the remainder of the union can no longer be jointly interested in anything; and the property of the old union has to be divided between the union which remains in existence and the parish which has ceased to form a part of it. A difficulty then arises with relation to this new kind of property which has come into existence under the Act of 1888. It was argued by the counsel for the Hendon Union that these annual sums were not "property" within the section. No doubt they were not specifically contemplated by the Legislature, but I cannot assent to the contention that they are not "property" within the meaning of the Act. In my opinion they are clearly included in the term "other property." Then comes the question how such property is under the section to be dealt with, and how the proportionate value to

the parish and the union respectively is to be ascertained. I agree that it is difficult, but I do not think it impossible to ascertain the present value to them respectively of the annuity in question. I have no doubt that, if an annuity of this kind could be put up for sale by auction, there would be persons who would buy it. I think it would have a saleable value. What I think the section contemplates in such a case is the capitalisation of the respective interests of the separated parish and the union at a ready money value: and I think this can be effected just as the value of a workhouse can be capitalised for the purposes of the section. If the Local Government Board had come to the conclusion that the value of the annuity should be divided between the parish and the union in proportion to their respective rateable values, I am not prepared to say that would have been wrong. They have not however done that, but have ordered that the annual sums shall be divided between the parish and the union in each year according to their respective rateable values in future years. I do not think that s. 32 permits that to be done. I think it does not contemplate anything being done in the future, but contemplates that there shall be an ascertainment of the proportionate value at the time of the separation. If anything further were necessary to shew that this is so, I would refer to the language of the latter part of the section which provides that "the sum to be received, if any, by such parish, shall be paid, or, as the said Commissioners shall direct, be secured to be paid to the overseers or guardians of the same, for the benefit of such parish and in diminution of the rates thereof and of the expense attending such alteration; and the sum to be so paid, or secured to be paid by every such parish shall be raised under the direction of the said Commissioners, by the overseers or guardians of such parish, or charged on the poor-rates of such parish, as the said Commissioners may see fit, and shall be paid or secured for the use and benefit of the union from which the same parish shall have been so separated, or of the persons or parishes otherwise entitled thereto, as the case may be." I cannot think that what the Local Government Board have done in this case is within the terms of the section. It was

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said that this Court could not interfere, unless the Board had exceeded their jurisdiction. I think that they have exceeded their jurisdiction in this case so far as Art. V. of their order is concerned. For these reasons I think the appeal must be allowed.

COLLINS L.J. I am of the same opinion. The 32nd section of the Poor Law Amendment Act, 1834, provides with regard to the division of the property of a union on its dissolution or the separation of a parish from it as follows: "Provided always that, in every such case, the said Commissioners shall, and they are hereby required to, ascertain the proportionate value to every parish of such union of the workhouses or other property held or enjoyed by such union for the use of the poor or benefit of the ratepayers therein, and also the proportionate amount chargeable on every parish in respect of all the liabilities of such union existing at the time of such dissolution or alteration of the same, and the said Commissioners shall thereupon fix the amount to be received, or paid or secured to be paid, by every parish affected by such alteration." Surely the meaning is that the value of the property is to be ascertained with reference to the state of things existing at the date of the dissolution or alteration of the union. Indeed, Channell J. seems to adopt this view in one part of his judgment. It seems to me clear that, with regard to the rights as well as the liabilities of the bodies affected, there is meant to be an ascertainment of amount then and there, the object being that they shall no longer be partners sharing the fluctuating fortunes of one another, but each shall stand thenceforth on an independent basis, and that the amount which each is to get in respect of the property previously enjoyed by the union shall be then finally settled. For that purpose I think the Legislature contemplate that the result will be the ascertainment of a certain amount which one body is at once to pay or secure to the other, not an obligation to pay in futuro according to a fluctuating standard. It seems to me that in the present case what the Local Government Board rely upon as amounting to a valuation is, when analyzed, really a refusal to value.

Suppose there was a freehold property belonging to the union which brought in certain rents. It is admitted that the right way of ascertaining the value of that property under the section would be to estimate the value in præsenti of the corpus of a property bringing in those rents. At any rate, it was admitted by the counsel for the Local Government Board that that would not be a wrong way. The other alternative is that, instead of fixing the value then and there of the corpus of such a property, the rights of the two bodies should be left to be fixed in the future by a future standard, namely, a proportion fluctuating with reference to the fortunes of the two bodies respectively from time to time. It seems to me that this is exactly what, having regard to the language used, the Legislature appear to have desired to avoid. I cannot therefore think that the section admits of such a mode of dealing with a freehold property. I agree with my Lord that, though it may be difficult to appraise the capital value of such an annual sum as is here in question, it is not impossible. The words, in the 26th section of the Local Government Act, 1888, "until Parliament otherwise determine," really make no difference, for what the expression conveys would have equally been the law if those words had not been there. It appears to me that such an annual sum is clearly "property" within the meaning of s. 32, and that its value is capable of being estimated. That being so, I think the proper mode of proceeding under the section is to ascertain its existing proportionate value to the separated parish and the rest of the union respectively at the time of the separation. I do not think it is possible to reconcile the view that the proper principle, on which to ascertain the proportionate value of freehold property to the two bodies respectively under the section, is by fixing the amount once for all with the view that, in reference to an annual sum like that in question, a wholly different principle is contemplated by the section, namely, an ascertainment of the proportionate value in futuro with reference to a fluctuating standard. I do not think that the section contemplates a different method of valuation in the two cases, and it seems to me that the first mentioned method is right.

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STIRLING L.J. I am of the same opinion. In this case a union was divided by the separation from it of a particular parish under the provisions of the Poor Law Amendment Act, 1834, s. 32. A question thereupon arises as to the mode in which the property belonging to the union as it originally existed is to be divided between the separated parish and the union as now constituted. I do not think that the 32nd section can be read without perceiving that the scheme of the legislation is that the rights of the bodies interested shall be ascertained once for all at the time when the separation takes place. The general idea of the scheme appears to be that one of the bodies interested shall take the whole or some part of the property, as the case may be, and the one so taking property shall pay to the other or others the value of their interest or interests in the property so taken as then ascertained by valuation under the section. For that purpose the Commissioners are "to ascertain the proportionate value to every parish of such union of the workhouses or other property held or enjoyed by such union for the use of the poor or the benefit of the ratepayers therein." No particular mode of ascertaining the value is prescribed, but there is no distinction drawn in this respect between "workhouses" and "other property." It seems obvious that, with regard to a workhouse, the idea was that a capital value should be put upon it, and that the body which took it should pay to the other or others, which did not take it, a portion of that value proportioned to the then estimated value of their interest or interests. The section directs that "the said Commissioners shall thereupon fix the amount to be received, or paid or secured to be paid, by every parish affected by such alteration," and "the sum to be so paid or secured to be paid by every such parish shall be raised under the direction of the said Commissioners by the overseers or guardians of such parish, or charged on the poor-rates of such parish, as the said Commissioners may see fit." The direction, therefore, is that the Commissioners shall first ascertain a fixed sum to be paid or secured by the one body to the other, and then direct the mode in which it is to be paid or secured. There is no difficulty in working this scheme out as to workhouses and property such

as the Legislature probably had in contemplation when the Act was passed. The difficulty arises from the fact that the Legislature in the year 1888 provided for the enjoyment by unions of a kind of property wholly different from anything which thay had enjoyed in 1834, namely, the annual sums of money payable under the Local Government Act, 1888, s. 24, sub-s. 2 (*d*), and s. 26, sub-s. 1. It was said that, as the payment of those sums was subject to the contingency that Parliament might in future determine otherwise, there was a difficulty in putting any value upon them in the same way as a value could be put upon a workhouse or other such property. Still, I think a value can be put upon them. I have no doubt that they are property within the meaning of s. 32, and that a value can be put upon them for the purposes of the section. I think such a value ought to be put upon them, and, that being done, the Local Government Board ought then to fix the proper sum to be paid by the union which will still receive them and received by the separated parish. That sum, in my opinion, must be ascertained by the Local Government Board on the same principle as that on which they would ascertain the proportion of the value of a workhouse which is to be paid or secured by the union retaining the workhouse to a separated parish. For these reasons it seems to me that, so far as regards Art. V. of their order, the Local Government Board have not complied with the terms of s. 32 of the Poor Law Amendment Act, 1834, and, therefore, this appeal should be allowed.

Appeal allowed.

Solicitors for Hendon Union: *D. R. Soames.*

Solicitors for Local Government Board: *Sharpe, Parker & Co.*

Solicitor for parish of Willesden: *W. G. Greig.*

E. L.

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Dec. 11.

[IN THE COURT OF APPEAL.]

ATTORNEY-GENERAL *v.* MIDLAND RAILWAY COMPANY.

Revenue—Stamp Duty—Railway Company—Increase of Nominal Capital—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 113.

Under the provisions of a special Act passed for the purpose of re-arranging and consolidating the stocks of a railway company, the following changes (inter alia) were effected.

The then existing 4 per cent. preference stock of the company was cancelled, and there was created in lieu thereof a 2½ per cent. preference stock, of which the total nominal amount and the proportion allotted to each stockholder were such as to make the amounts payable by way of dividends the same as on the old stock. The then existing ordinary stock of the company was cancelled, and there was created in lieu thereof a new ordinary stock of twice the nominal amount of the old stock, one-half being preferred ordinary stock, entitled to a dividend at the rate of 2½ per cent. per annum, and the other half being deferred ordinary stock. There was allotted to each holder of the old ordinary stock as much of each kind of the new ordinary stock as the amount which he held of the old ordinary stock:—

Held, that the increase so authorized by the Act of the nominal amount of the share capital of the company was "an increase of the amount of nominal share capital" within the meaning of s. 113 of the Stamp Act, 1891, and that the stamp duty imposed by that section was payable in respect of it.

APPEAL against the judgment of a Divisional Court (Ridley and Darling JJ.) upon a special case stated on an information by the Attorney-General for penalties against the defendants under s. 113 of the Stamp Act, 1891.

The facts, which are fully set out in the report of the case in the Court below (1), may be more briefly stated as follows:—

On August 6, 1897, the Midland Railway Act, 1897, was passed upon the petition of the defendant company.

This Act recited (inter alia) that it was expedient that provision should be made as contained in the Act for the rearrange-

(1) [1900] 2 Q. B. 353.

ment and consolidation of the several classes and denominations of the shares and stocks in the capital of the company, and of their loans and debenture stocks.

The material sections of the Act were as follows:—

Sect. 59 provided that, subject to the provisions of the Act, the company might consolidate three guaranteed and rent-charge stocks mentioned in the section into one guaranteed stock of one class, and bearing interest at the uniform rate of 2*l.* 10*s.* per cent. per annum, and that, upon the said consolidation taking effect, every holder of existing stock should be entitled to and should receive, in substitution for every 100*l.* of such stock held by him, such an amount of the new 2½ per cent. perpetual guaranteed stock as would yield him an equivalent annual return to that which he then received.

Sect. 60 was as follows: "On the first day of April, 1898, the then existing and authorized four per centum perpetual preference stock of the company shall be, by virtue of this Act, cancelled and extinguished, and on that day there shall be, by virtue of this Act, without further or other authority, created in lieu thereof two and a half per centum perpetual preference stock of the company to an amount exceeding by sixty per centum the nominal amount of the stock so cancelled and extinguished: every holder of the existing four per centum perpetual preference stock shall be entitled to and shall receive, in substitution for every one hundred pounds of such stock held by him, one hundred and sixty pounds of the new two and a half per centum perpetual preference stock, and so in proportion for every fraction of one hundred pounds."

Sect. 61: "On the first day of October, 1897, ... all the existing and authorized ordinary stock of the company shall be, by virtue of this Act, cancelled and extinguished, and on that day there shall be, by virtue of this Act, without further or other authority, created ordinary stock of the company to the amount of seventy millions, eight hundred and sixty-nine thousand, eight hundred and ninety-four pounds, and sixteen shillings in lieu of and in substitution for the stock cancelled and extinguished as aforesaid."

Sect. 62: "(1.) Of the new ordinary stock one-half . . . .

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shall be termed 'preferred converted ordinary stock,' and shall be entitled to an uniform dividend at the rate of two pounds ten shillings per centum per annum, which shall, subject to the provisions of this Act, be payable out of the profits of each half year next after the dividend on any preference stock of the company. (2.) The other half . . . . shall be termed 'deferred converted ordinary stock,' and shall be entitled to such half-yearly dividend as may be from time to time declared thereon by a general meeting, after providing for payment of the dividends payable on any such preference stock as aforesaid, and on the preferred converted ordinary stock for the time being created and issued."

Sect. 63: "Every holder of the existing ordinary stock shall be entitled to and shall receive, in substitution for every one hundred pounds held by him of that stock, one hundred pounds preferred converted ordinary stock and one hundred pounds deferred converted ordinary stock, and so in proportion for every fraction of one hundred pounds."

Sect. 66 provided that any increase in the nominal amount of the preference or ordinary capital of the company by virtue of the Act should not increase the amount which under any Act or Acts the company was authorized to borrow upon mortgage or by the creation and issue of debenture-stock, and that for the purpose of any such Act or Acts the amount of capital in respect of which the borrowing powers of the company might be exercised should be taken to be the amount of which the capital of the company would have consisted if the ordinary stock had not been converted under the Act.

By s. 59, 3,899,121*l.* 5*s.* four per cent. consolidated perpetual rent-charge stock was authorized to be consolidated so as to amount to 6,238,594*l.* guaranteed two and a half per cent. stock; 150,000*l.* Sheffield and Rotherham perpetual preferential stock was authorized to be consolidated so as to amount to 375,000*l.* guaranteed two and a half per cent. stock; and 6,337,076*l.* 12*s.* 6*d.* four per cent. consolidated perpetual guaranteed preferential stock was authorized to be consolidated so as to amount to 10,139,322*l.* 12*s.* guaranteed two and a half per cent. stock.

By s. 60, 29,048,191*l.* 15*s.* four per cent. perpetual preference stock was extinguished, and in lieu thereof, 46,477,106*l.* 16*s.* two and a half per cent. perpetual preference stock was created.

By s. 61 ordinary stock (existing and authorized) to the amount of 35,434,947*l.* 8*s.* was extinguished, and in lieu thereof was created 35,434,947*l.* 8*s.* preferred converted ordinary stock, entitled to a dividend at the rate of 2*l.* 10*s.* per cent. per annum, and 35,434,947*l.* 8*s.* deferred converted ordinary stock.

The Commissioners of Inland Revenue claimed that duty was payable in respect of, or upon, the amount of the increases due to ss. 59, 60, and 61 of the Midland Railway Act, 1897, as being increases of "the amount of nominal share capital" within s. 113 of the Stamp Act, 1891. The defendants refused to deliver the statement under that section with reference to these increases, and contended that they were under no liability or duty to deliver such a statement.

The question for the Court in substance was, whether the increases in question ought to be included in a statement of the amount of increase to be delivered under the Stamp Act, 1891.

The Divisional Court gave judgment for the Crown.

Sir R. T. Reid, Q.C., and *Asquith, Q.C.* (*Loehnis* with them), for the defendants. There has not in this case been "any increase of the amount of nominal share capital" of the company authorized by the Midland Railway Act, 1897, within the meaning of s. 113 of the Stamp Act, 1891. The increase of capital contemplated by that section is a real increase of the amount of nominal capital which the company is entitled to raise. The words of the section are not "increase of the nominal amount of share capital," but "increase of the amount of nominal share capital." The Midland Railway Act, 1897, only effected a consolidation and rearrangement of the stocks constituting the then existing nominal capital of the company for the purposes of the distribution of dividends among the stockholders; it did not authorize any real increase of the nominal capital by raising fresh capital. Precisely the same

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result, for instance, might have been obtained with regard to the ordinary stock by splitting every 100*l.* of stock into 50*l.* preferred ordinary stock, bearing interest at 5*l.* per cent., and 50*l.* deferred ordinary stock. The object of inserting the word "nominal" in s. 113 was to include cases where a company does not choose at once to call up all its capital, but husbands its resources, and to provide that the company in such cases shall be taxed upon the amount of the resources which they are entitled to call into play. Here the company's resources were not increased by the special Act. The nominal capital of a company means the capital named by the Act or instrument constituting it as that which the company has power to raise. The *Attorney-General* v. *Milford Docks Co.* (1) is not in point, for in that case there was a real increase of capital, because debenture stock was cancelled, and preference stock issued in lieu thereof, which represented a cancellation of indebtedness.

Sir E. H. Carson, S.-G., and *Rowlatt* (*Danckwerts, Q.C.*, with them), for the Crown. The effect of the Midland Railway Act, 1897, was that the pre-existing stocks of the company were cancelled and extinguished, and new stocks created of a different amount and nature, which conferred different rights and had different incidents, and which involved the possibility of an increase of the number of shareholders. If the company had been given power to issue these stocks to the public in the first instance, they would clearly have had to pay the stamp duty on the total nominal amount of them as they exist at present, whether they actually raised the whole amount or not. The statute makes the liability to pay and the amount of the duty depend on the amount of the nominal capital, i.e., of the capital named in the Act under which the capital is created. Previously to 1897 the amount of the named capital of the defendant company was 74 millions odd: the Midland Railway Act, 1897, allows the company to have a named capital of 134 millions odd. It is impossible to say that there has not been an increase of the amount of the nominal share capital of the company. The contention for the defendants really

(1) (1893) 69 L. T. 453.

involves reading words into the Act which are not to be found there.

Sir R. T. Reid, Q.C., in reply.

A. L. SMITH M.R. The question in this case is whether an increase of the amount of nominal share capital of the company has been authorized by the Midland Railway Act, 1897, within the meaning of s. 113 of the Stamp Act, 1891. It seems to me impossible to deny that, whereas prior to the Act of 1897 the nominal share capital of the company was, roughly speaking, 74 millions odd, the result of what has been done by the authority of that Act is that it is now 134 millions odd. In other words, by that Act of Parliament an increase of the amount of the company's nominal share capital has been authorized. It is said that the effect of the Act was merely to split the old ordinary stock into two, and that no fresh capital has really been obtained. That is no doubt true, but it appears to me, nevertheless, that the case comes exactly within the terms of s. 113, because there has undoubtedly been an increase of the amount of the nominal capital of the company. The counsel for the defendant company sought to read the words of the section as equivalent to "actual" increase of the amount of the share capital. But that construction involves in my opinion reading into the section what does not exist in it, which we are not entitled to do. The Stamp Act, 1891, does not provide that the amount of the stamp duty shall be determined with reference to the amount of capital actually raised, but that it shall be charged upon the amount of the nominal share capital. Suppose a company in the first instance only raised half the capital which it was authorized to raise, it would nevertheless have to pay the duty on the whole amount. It may be that the defendant company gets no actual pecuniary benefit by the increase of the nominal share capital from 74 to 134 millions; but I do not see how it is possible to say that an increase of the amount of the nominal share capital was not authorized by the Act of 1897. Whether what we are deciding is in accordance with the real intention of the Legislature I cannot tell. We can only construe the words of the section

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according to their plain meaning. I think the judgment of the Court below must be affirmed.

COLLINS L.J. I agree. I think this case comes exactly within the words of the section, even if the definition of nominal share capital given by the defendants' counsel be adopted. I will take it that the nominal share capital is the capital named as that which the company is authorized to raise. Suppose that in this case the company had been authorized in the first instance to raise a named capital equal in amount to their present nominal capital, namely, 134 millions odd. Whether they actually raised it all or not, they would have had to pay the stamp duty on the whole of it. It cannot be denied that as a fact the amount of the company's nominal share capital before the Midland Railway Act, 1897, was 74 millions odd, and that now it is 134 millions odd. In each case the sum named represents the amount of the capital named as that which the company were authorized to raise. The fallacy that appears to me really to underlie the argument for the defendants is that the duty is only intended to be payable on capital actually raised. When it is once admitted that it is immaterial for the purposes of the duty whether the amount of the nominal capital is actually raised or not, the foundation of the argument appears to me to fail. As I have said, I think the case comes within the exact words of the Stamp Act, 1891, for the Midland Railway Act, 1897, has undoubtedly authorized an increase of the nominal share capital of the company from 74 millions odd to 134 millions odd.

STIRLING L.J. I am of the same opinion. By s. 113 of the Stamp Act, 1891, a company which falls within that section has to send in to the Commissioners of Inland Revenue a statement of the amount of its nominal share capital. In the case of an increase of that nominal share capital being authorized by Act of Parliament it has to deliver to the Commissioners a statement of the amount of the increase. On those statements certain ad valorem stamp duties are payable. The question in this case is whether there has been an increase of

the nominal share capital of the company authorized by the Midland Railway Act, 1897. What is nominal share capital? I agree that it is the share capital named as that which the company has power to issue. Previously to the passing of the Act of 1897, the defendant company had under their powers issued about 35 millions of ordinary capital. Sect. 61 of the Act provides that on a certain day all the existing and authorized ordinary stock of the company shall be by virtue of the Act cancelled and extinguished, and on that day there shall be by virtue of the Act, without further or other authority, created ordinary stock to the amount of 70,869,894*l.* 16*s.* in lieu of and in substitution for the stock cancelled and extinguished as aforesaid. Therefore, when that section took effect, the original 35 millions odd of ordinary share capital was cancelled, and in the place thereof the company were authorized to issue capital to the amount of 70 millions odd. Is that, or is that not, an increase of the amount of nominal share capital? For the purposes of the Stamp Act, the mode in which the share capital is applied is immaterial; consequently it appears to me that that question is merely one of arithmetic, and that it is impossible to say that there has not been such an increase.

Appeal dismissed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendants: *Beale & Co.*

E. L.

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1900
Nov. 23, 29;
Dec. 12.

[IN THE COURT OF APPEAL.]

In re SCOTT, DECEASED.

Revenue—Estate Duty—Devise to Issue of Testator—Death of Devisee in Lifetime of Testator—Issue of Devisee living at Death of Testator—Devise taking effect as if Devisee had survived Testator—Property passing on Death—Wills Act, 1837 (7 *Will.* 4 *and* 1 *Vict. c.* 26), *s.* 33—*Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-s.* 1 (*a*); *s.* 22, *sub-s.* 1 (*l*), *sub-s.* 2 (*a*).

A father devised real property to his son, who died in the lifetime of the father, leaving a daughter, who was living at the death of the father. The son devised his residuary real estate to trustees. This devise included the property devised by the father's will, and took effect with regard to it by virtue of the Wills Act, 1837, s. 33. On the death of the father estate duty was paid on all the property which passed on his death, including the property devised to his son. The Commissioners of Inland Revenue claimed in addition estate duty on the last-mentioned property as property passing on the death of the son within the meaning of the Finance Act, 1894.

On appeal by the trustees against the claim of the Commissioners under s. 10 of the Finance Act, 1894:—

Held, that the duty so claimed was payable by the trustees.

APPEAL from the judgment of a Divisional Court (Darling and Channell JJ.) upon an appeal by the trustees of the will of John Scott, junior, against a claim of estate duty under the Finance Act, 1894, by the Commissioners of Inland Revenue.

The facts are briefly stated in the head-note and appear at length in the report of the case in the Court below. (1)

The Divisional Court gave judgment for the Crown.

Joseph Walton, Q.C., and *Edwardes Jones*, for the petitioners. The property in question was not property which passed on the death of John Scott, junior, nor was it property of which at the time of his death he was competent to dispose, within the meaning of the Finance Act, 1894, s. 1; s. 2, sub-s. 1 (*a*); s. 22, sub-s. 1 (*l*), sub-s. 2 (*a*). The Wills Act, 1837, s. 33, in order to prevent the intention of testators from being frustrated,

(1) [1900] 1 Q. B. 372.

introduced a fiction, namely, that in cases within the section the devisee or legatee is to be supposed to have died immediately after, though in fact he died before, the testator; but that fiction ought not to be carried beyond the purpose for which it was created. The Finance Act, 1894, contemplates a real passing of property on a real death. It is impossible to say that John Scott, junior, was competent to dispose of this property on his actual death, except in a sense in which any one may be said to be competent to dispose of anything, namely, in the sense that, if not subject to disability of any kind, he could dispose of the thing if he had it to dispose of. But that cannot be the sense intended by the Finance Act. The provision of s. 2, sub-s. 1 (*a*) of the Finance Act, 1894, was introduced to meet the case of a person having a general power of appointment over property. At the time of the death of John Scott, junior, he had no interest whatever in the property; it was the father's property to dispose of in any way he pleased. The Wills Act, 1837, s. 33, gave John Scott, junior, no interest in or power over the property. All that it provides really is that, in order that there may not be a lapse, and for the purpose of passing the property under the will of the testator, the death of the devisee or legatee shall be deemed to have taken place after that of the testator. But that provision has no relation to the purposes of a taxing statute like the Finance Act, 1894. The Wills Act, 1837, s. 33, in substance provides that the testator's will shall have a certain effect, namely, as if it contained a clause providing that, if the devisee or legatee die before the testator, the property shall go to the persons to whom it would have gone, if that had not been the case. The property passes really under the will of the father, not under that of the son, though the will of the son has to be looked at to see to whom it is to go under the father's will. This is not like the case of property over which there is a power of appointment, or which is to vest on a contingency, for in those cases there is an existing interest at the time of death. Here there was none in John Scott, junior. Suppose, by way of illustration, a son had made a will in his father's lifetime specifically devising property which he expected his father to leave him,

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and then died in the father's lifetime, and the father afterwards, wishing to give effect to the son's will, left the property by will to the person designated by it. Could it be said in such a case that the son was, within the meaning of the Finance Act, 1894, competent to dispose of the property at the time of his death? That case is identical in substance with the present. The chance that some one may leave a person property is not property of which he is competent to dispose. The property in this case is not within the definition of "property passing on the death" given by s. 22, sub-s. 1 (*l*), nor was John Scott, junior, competent to dispose of it within the meaning of s. 22, sub-s. 2 (*a*). "Competent to dispose of" means competent by virtue of interest, not competent as regards personal capacity: see *Attorney-General* v. *Hallett*. (1) The case of *Pearce* v. *Graham* (2) shews that the effect of the Wills Act, 1837, s. 33, is not that the child is to be supposed to survive the father for all purposes. The cases as to the effect of the Wills Act, 1837, s. 33, with regard to probate duty, such as *Perry's Executors* v. *Reg.* (3), are not in point, for they depend on the well-settled principle that probate duty is payable on everything which the executors take by virtue of the will.

[They also cited *In re Parsons* (4); *Johnson* v. *Johnson* (5); *Winter* v. *Winter* (6); *In the Goods of Parker* (7); *Lord Advocate* v. *Bogie* (8); *Attorney-General* v. *Brunning* (9); *In re Hensler* (10); *Lord Lilford* v. *Attorney-General*. (11)]

Sir R. B. Finlay, *A.-G.*, and *Vaughan Hawkins*, for the Crown. The Crown does not claim the duty as on a constructive death of John Scott, junior, after his father's death, but on his actual death. The effect of the Wills Act, 1837, s. 33, is that more property passed upon the death of John Scott, junior, than at first appeared. By the Finance Act, s. 22, sub-s. 1 (*l*), "property passing on the death" includes "property passing either immediately on the death or after any

(1) (1857) 2 H. & N. 368.
(2) (1863) 9 Jur. (N.S.) 568.
(3) (1868) L. R. 4 Ex. 27.
(4) (1890) 45 Ch. D. 51.
(5) (1843) 3 Hare, 157.
(6) (1846) 5 Hare, 306.
(7) (1860) 1 Sw. & Tr. 523.
(8) [1894] A. C. 83.
(9) (1860) 8 H. L. C. 243.
(10) (1881) 19 Ch. D. 612.
(11) (1867) L. R. 2 H. L. 63.

interval, either certainly or contingently." John Scott, junior, was competent to dispose of the contingency of his taking this property at the time of his death, and in the event it appeared that he was competent to dispose of the property, for he did in fact dispose of it by his will. The case is really concluded by the decision in *Perry's Executors* v. *Reg.* (1) It is well settled by the decisions that the effect of the Wills Act, 1837, s. 33, is that the property comprised by the devise in the father's will is to be considered in point of law as having vested in the son after the father's death with all the incidents of such a vesting: *Johnson* v. *Johnson* (2); *Winter* v. *Winter* (3); *Eager* v. *Furnivall.* (4) But for the Wills Act, 1837, s. 33, the property would not have passed to the petitioners. The effect of that section being that it does so pass under the will of John Scott, junior, it must be considered as passing subject to all the incidents of property so passing. All the arguments for the petitioners were anticipated in *Johnson* v. *Johnson* (2), and negatived by the decision in that case. It is quite clear upon the authorities that the effect of s. 33 of the Wills Act is not that the property passes direct under the father's will to the persons designated by the son's will: *Eager* v. *Furnivall.* (4) It is a long-exploded doctrine that s. 33 of the Wills Act is to be treated as a construction section, like ss. 24–31 of the same Act.

[They also cited *Wisden* v. *Wisden* (5); *Attorney-General* v. *Loyd.* (6)]

Joseph Walton, Q.C., for the petitioners, in reply.

Cur. adv. vult.

Dec. 12. A. L. SMITH M.R. read the following judgment:— The point raised in this case is whether a second estate duty is payable to the Crown upon property valued at 80,000*l.* under the Finance Act of 1894, in the following circumstances. Upon May 4, 1896, John Scott, junior, whom I will call the

(1) L. R. 4 Ex. 27.
(2) 3 Hare, 157.
(3) 5 Hare, 306.
(4) (1881) 17 Ch. D. 115.
(5) (1854) 2 Sm. & Giff. 396.
(6) [1895] 1 Q. B. 496.

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son, made his will, whereby he appointed the petitioners his executors and trustees, and he devised and bequeathed to them all his residuary real and personal estate in trust, so far as is material, for his daughter Muriel Elsie Scott absolutely. Upon January 22, 1899, the son died, and probate of his will was taken out and all duties then payable upon the son's estate were thereupon paid by his executors to the Crown. John Scott, senior, whom I will call the father, died about four months after his son—namely, on May 12, 1899—leaving a will dated June 5, 1891, by which he devised to his son freehold property in the City of London of the value of 80,000*l.* This estate of the father has been rightly charged with estate duty, it being property which passed upon the death of the father, and this duty has been paid; but the Crown now claims estate duty over again upon this 80,000*l.*, as having also passed upon the death of the son to his devisees under his will of May 4, 1896, although it never did pass to these devisees until four months after the actual death of the son.

It cannot be denied that estate duty under the Act may become payable over and over again upon the passing of property upon death at very short intervals of time, and, if the son in this case had died the day after his father instead of dying before him as he did, the 80,000*l.* of property would have been chargeable with estate duty again when it passed upon the son's death to his devisees. But in the present case the son died about four months before his father, and it is argued for the executors, the appellants, that the second estate duty which is claimed is therefore not payable under the Act of 1894.

I agree that in the Act of 1894 the words "property passing on the death of the deceased" primâ facie mean the natural and not the statutory or artificial death of the deceased; but there are other words in the Act which enlarge the words "property passing on the death," and which have to be dealt with, and they are these: Sect. 2, sub-s. 1—"Property passing on the death of the deceased shall be deemed to include the property following, that is to say, (*a*) property of which the deceased was at the time of his death competent to dispose."

It cannot be denied that property, by virtue of the Wills Act, 1837, to which a deceased is entitled at the time of his death, he is competent to dispose of, although he had it not at the date of his will; nor can it be denied that, if there had been no Wills Act, there would have been in the present case a lapse of the 80,000*l.* of property, and the son would have taken nothing. I do not agree with Mr. Joseph Walton when he says on behalf of the appellants that the Wills Act, 1837, has nothing to do with the case in hand, for, in my judgment, it has, and it must be looked at to ascertain what it was that the son at the time of his death was competent to dispose of. For instance, it must be looked at to see whether the son was competent to dispose only of property of which he was possessed at the date of his will, as was the case as to real estate before the Wills Act, or of which he was possessed at the time of his death, which is the case since the passing of the Wills Act. When ascertaining what real estate he was competent to dispose of, and upon which taxation is to take place, surely the Wills Act must be looked at, for it plays a very important part in the investigation. Now s. 24 of the Wills Act enacts that every will shall "take effect" as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will; in other words, by the Wills Act a testator is competent to dispose of all the real and personal estate he possesses at the time of his death, and not only, as before the Wills Act, of the real estate he possessed at the date of his will. This may make a great difference when, for the matter of taxation, it has to be determined, as in this case, what the deceased was competent to dispose of; for this is made the subject of estate duty. Again, to see whether the son took anything under his father's will of which he was competent to dispose, the Wills Act must also be looked at, in order to see whether it has any effect upon what the son was competent to dispose of. And what do we find? We find, by s. 33, that in a case like the present, although the son should die in the lifetime of his father, a bequest of the father to the son shall not lapse, but shall "take effect" as if the son had died immediately after the death of his father, unless the

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contrary intention should appear by the will. As before stated, if the son in the present case had in fact died immediately after the death of his father, the second estate duty now claimed would clearly have been payable; and, if there had been no Wills Act, the son would have had nothing to dispose of. But the Wills Act enacts that the will of the father shall take effect as if the son had died immediately after his father—i.e., that, in the special circumstances to which the section applies, the son shall be competent to dispose of what is left to him by his father, although he may in fact die before his father. It is obvious that the Wills Act must be resorted to by the appellants to get rid of the lapse which otherwise would have taken place; and the same section of the Act by which the appellants get rid of the lapse enacts that the will of the father shall "take effect" as if the son had died immediately after his father; that is, that the son in this case was competent to dispose of the 80,000*l.* of property, subject to his father revoking his will, which he never did. If the appellants take the benefit of s. 33, which they do, and thus obtain the 80,000*l.* of property, they must take the burden also—i.e., of paying the estate duty chargeable thereon. My brothers Collins and Stirling have shewn me their judgments, and, having read them, I need, I think, write no more, excepting to say that I agree in their judgments, and that this appeal must be dismissed.

COLLINS L.J. read the following judgment:—This case appears to me to present little difficulty when s. 33 of the Wills Act is construed in what seems to me its obvious primâ facie meaning, and in accordance with the interpretation which, as I think, it has received through a series of authorities. There is no doubt that, under s. 1, s. 2, sub-s. 1, and s. 2, sub-s. 1 (*a*), of the Finance Act, estate duty is payable upon the property in question, if, under the last sub-section, John Scott, junior, was at the time of his death "competent to dispose of it." The property in question could clearly never have been his to dispose of in the events which happened but for the operation of s. 33 of the Wills Act. The property was devised to him by his father, and, as he died in his father's lifetime, the devise

would have lapsed, and could not, therefore, have come under any disposition made by him. But it seems to me equally clear that the effect of s. 33 of the Wills Act is to confer upon him a right to dispose of it. It enacts that, in the events which have happened here, the devise of this property in his father's will shall not lapse, but shall take effect as if the death of John Scott, junior, had happened immediately after that of his father. Now, if John Scott, junior, had survived his father, he would have taken the property devised and would have been competent to dispose of it. The right to dispose of it would have been an incident of his ownership, and it would have passed under a will made by him before his father's death. Unless all these consequences follow in like manner in the events which have happened here, the devise does not take effect, as the statute says it shall, as if the son had survived his father. What is the effect, then, in view of this legislation, of his actual death having taken place before his father's? Can it be said to deprive him of the benefit which the statute expressly confers upon him, and leave him under the same incapacity to dispose of the property as he would have been under before the Act? A will of the same date and in the same terms as that which he actually made would clearly have covered the property in question, had he survived his father; and by the section the devise to him is to have the same effect as if he had survived. It follows that by the operation of the statute he was as to this particular class of property rendered competent to dispose of it as property falling in within the constructive period of his life. His capacity to dispose would end necessarily with his actual life, but as to this class of property his power of controlling it depends upon its falling in before his constructive, not his actual, death. It is said that at the date of his actual death he had no more than a spes successionis, which is a very different thing from the actual property, and that it is the actual property and not the spes successionis that he must be competent to dispose of in order to let in the operation of the Finance Act. But the statute by the fiction of his surviving his father postpones the period during which he may become entitled to property to a date

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after his father's death, and by that time the hope had ripened into a reality. Its effect is to make him competent to dispose in his lifetime of something as to which he had only a spes successionis in his lifetime, provided it became a certainty, not as in the case of ordinary property before his natural death, but before the time named in the Act. It is inherent in the nature of the legislation itself that it cannot be determined at the time of the natural death whether he had or had not the power to dispose of certain property, but by the light of after events we know now that he had. The statute in moving forward the date from which the will speaks to a point of time when he was, in fact, incapable of volition, has really only reapplied to a particular case the general principle of the 3rd section, which makes it lawful for every person to dispose by will of property to which he is entitled at the time of his death, "notwithstanding that he may become entitled to the same subsequently to the execution of his will." Thus, efficacy is given to the antecedent disposition subject to an event which cannot be determined till his death, and is not made to depend on any inference of adoption by the testator at the moment of his death of the existing disposition. That this is so is evident from the fact that a will made by a person who became a lunatic immediately afterwards and never recovered testamentary capacity would carry property to which he did not become entitled till after the execution of the will. Whether he was competent or incompetent to dispose of it when he made the disposition is made to depend on an after event. It becomes a good or bad disposition according to the event, but his competency at the time of making it is not affected. We merely learn by the event whether he was in fact competent or not to control the property by his disposition. The statute might just as well have drawn an arbitrary line at six months after the actual death; and the state of facts then would determine whether any disposition made by the testator as to particular property was effective or not. If it turns out to be effective, it must be because he was competent to make it when he made it, which must have been in his lifetime. I am of opinion, therefore, that John Scott, junior, was at the time

of his actual death competent to dispose of the property in question.

But, further, even if the true view of s. 3 of the Wills Act is that, in making the will embrace property falling in up to the death of the testator, it assumes an exercise of volition by the testator, which may never in fact have taken place, after he has become entitled to the property, I see no difficulty in assuming that the same fiction applies in the case of the son who is brought to life again for the purposes of the 33rd section; and I should have no hesitation in holding that all fictions incident to conferring upon him testamentary capacity to dispose of the property in question must be included in and covered by the central fiction of his prolonged existence. Thus, then, John Scott, jun., by virtue of the Wills Act must be taken as having acquired the property in question with all its incidents, and he was, therefore, competent to dispose of it within the Finance Act. It is said that a fiction should not be extended so as to let in taxation, but I think full effect must be given to the fiction so as to carry out the purpose of the Wills Act itself, which was to vest the property in John Scott, jun., as though he had survived his father. I see no reason why the fiction, which was introduced for the purpose of putting him in the position which his father's will intended him to be placed in, should be held to stop short of imposing the burden which would have been an incident of the property had he lived to claim the gift. Without the fiction his estate would have got nothing. Mr. Walton's main argument, which, as I understood it, was that the Wills Act merely imposes a particular construction on the father's will as though the provisions of the son's will were set out in it, seems to me to find no foundation whatever in the Act, which in terms treats the son as surviving and leaves the supervening rights to be worked out on that footing. Moreover, it seems to me, though he strenuously contended the contrary, that the point is decided by *Johnson* v. *Johnson* (1), followed by *Winter* v. *Winter* (2); *Wisden* v. *Wisden* (3) and *Eager* v.

(1) 3 Hare, 157. (2) 5 Hare, 306.
(3) 2 Sm. & Giff. 396.

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Furnivall (1), as well as by *Perry's Executors* v. *Reg.* (2), and for the same reason *Lord Advocate* v. *Bogie* (3) does not apply. I am of opinion, therefore, that the appeal must be dismissed.

STIRLING L.J. By s. 1 of the Finance Act, 1894, there is imposed in the case of every person dying after August 1, 1894, estate duty "upon the principal value, ascertained," as in the Act mentioned, "of all property, real or personal, which passes on the death of such a person." By s. 2, sub-s. 1, "property passing on the death of the deceased shall be deemed to include," amongst other particulars, "(*a*) property of which the deceased was, at the time of his death, competent to dispose." By s. 22, sub-s. 2 (*a*), "a person shall be deemed competent to dispose of property, if he has such an estate or interest therein, or such general power as would, if he were sui juris, enable him to dispose of the property."

It is contended on behalf of the Crown that, regard being had to the terms of the Wills Act, s. 33, John Scott, jun., had such a general power as enabled him to dispose of the property devised to him by his father's will, and consequently that this property fell within the terms of s. 2, sub-s. 1 (*a*), as being property of which he was at the time of his death competent to dispose. In my opinion this contention is right.

Sect. 33 of the Wills Act provides that "where any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will." All the conditions referred to in this section occur in the present case.

This section differs in its terms from ss. 24–31 inclusive. In these last-mentioned sections the Legislature has seen fit to

(1) 17 Ch. D. 115. (2) L. R. 4 Ex. 27.
(3) [1894] A. C. 83.

provide that under certain circumstances a particular meaning shall be attributed to certain language which may be found in a will. In ss. 32 and 33 the object of the Legislature is to give legal effect in a prescribed manner to certain testamentary gifts which, under the law as it stood at the time of the passing of the Act, would have lapsed, i.e., would have altogether failed. Neither in s. 32 nor in s. 33 does the Legislature enact that the will shall be read and construed as if it contained language which is not found in it; in both these sections it is enacted that testamentary gifts of the kind referred to shall *not* lapse, but *shall take effect*. The words which follow point out what the effect is to be. In s. 33 the effect is to be "as if the death of" the devisee or legatee "had happened immediately after the death of the testator." To ascertain the meaning of this, let me suppose that the testator by his will has (as in the present case) devised real estate in fee to a child who predeceases him. If the child had survived the testator, the will would have passed the real estate to that child in fee; and the Legislature prescribes that, notwithstanding the death of the child, the legal effect of the will shall be the same—that is to say, that the will shall pass the real estate to the child in fee. Such seems to me the natural meaning of the language of the Act; nor can I see any difficulty in understanding it. The Legislature has simply provided that in certain cases there shall be a posthumous addition to the property of a deceased person, the object of such provision being to place that additional property at the disposal of the deceased while still living.

At this point, in my judgment, the operation of the Wills Act ceases; and this additional property is left to go and devolve as part of the property of the deceased child. If the child, while living, entered for valuable consideration into any contract with reference to such property (as, for example, by way of sale or mortgage, or by way of covenant in a marriage settlement), by such contract the property will be bound. If the child made a will by which such property is, by appropriate language, disposed of, either specifically or otherwise, the property will pass under such disposition. If the child died intestate, the property will go to the persons entitled by law as

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upon an intestacy. If the child died an undischarged bankrupt, it will vest in the trustee in bankruptcy, and so on. But the Wills Act does not contain any provision which directly confers any benefit on persons claiming under the child, whether those persons take by act inter vivos, or by testamentary disposition, or by operation of law. Still less does it contain any provision in favour of the Crown; and, if the Crown is entitled to estate duty on this property, appropriate language must be found in the Finance Act. That language I find in s. 2, sub-s. 1 (*a*), and s. 22, sub-s. 2 (*a*).

I have dwelt on this point at greater length than I otherwise should, because it is my misfortune to find myself in disagreement (or at least apparent disagreement) as to it with the opinion expressed by Channell J. in the Court below. I refer particularly to the passage at page 386 in the report in [1900] 2 Q. B., beginning "What the Act does say."

The view which I have taken of the construction of s. 33 of the Wills Act appears to me to be in accordance with authority. The leading case on the subject is *Johnson* v. *Johnson*. (1) There the testator, Robert Johnson, devised and bequeathed to his son Michael Payne Johnson certain specific real estate and a share of his personal estate. Michael Payne Johnson died in his father's lifetime, leaving a widow and one child, the latter of whom survived the father. The son had made a will and codicil, by which he gave (in substance) all his property to his wife: and the question was whether the property which was given to the son by his father's will passed by the son's will. Wigram V.-C. held that it did. He said (2): "Upon the construction of the 33rd section of the statute 1 Vict. c. 26, taken alone, a legatee within that section would take the same provision under his father's will, and *with the same powers and incidents of property*, as if he had actually survived the testator." He also said (3): "Without admitting that the words of the 3rd section, taken alone, do not sufficiently describe a future accruing interest, like that under consideration, I think the legatee has, upon the true construction of the whole Act, a

(1) 3 Hare, 157.

(2) 3 Hare, at p. 163.

(3) 3 Hare, at p. 164.

testamentary power over it. The 3rd and 24th sections make the will speak from the death of the testator; and the 33rd section in effect declares that, in the circumstances contemplated by that section, the child shall be taken to have died on a day later than his natural death." That case, therefore, establishes that a devisee or legatee within s. 33 has a testamentary power over property devised or bequeathed to him by his father's will, though he may die in his father's lifetime. *Winter* v. *Winter* (1) is another decision to the like effect. In *Pickersgill* v. *Rodger* (2) Sir George Jessel M.R., speaking of s. 33 of the Wills Act, says (3): "The result, therefore, is this, that the child dying in the testatrix's lifetime has his estate augmented by the devise or bequest made to him by the testatrix; in other words, the subject of the devise or bequest falls into the estate of the child, and of course can be disposed of by the will of that child, if that will contains apt words to dispose of it."

In *Eager* v. *Furnivall* (4) Sir George Jessel M.R., after citing and explaining *Johnson* v. *Johnson* (5), says: "That, therefore, decides that the property is either disposable of by will or descends in the case of intestacy, as in this case. That being so, then there is no doubt that the person to take would be the heir of the devisee, and under the Inheritance Act he takes as purchaser." This passage was in argument interpreted as meaning that the heir of the devisee would take as purchaser. Such an interpretation is directly contrary to the decision of Stuart V.-C. in *Wisden* v. *Wisden* (6), and inconsistent with what is laid down by Sir George Jessel himself in the immediately preceding context. I think that by "he" the learned judge meant the devisee himself, and not the heir of the devisee.

In *In re Hensler* (7) a father by his will made a devise to his son, who died in his father's lifetime, leaving issue living at the time of his death, and having by his will devised all his real

(1) 5 Hare, 306.
(2) (1876) 5 Ch. D. 163.
(3) 5 Ch. D. at p. 172.
(4) 17 Ch. D. 115.
(5) 3 Hare, 157.
(6) 2 Sm. & Giff. 396, at p. 405.
(7) 19 Ch. D. 612.

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estate to his father. Hall V.-C. said: "By virtue of the 33rd section of the Wills Act the property passed under the devise in the father's will, as if the devisee had died immediately after the death of his father. The effect of that is that I must consider the son to have survived his father, and to have taken as devisee. I must also consider that the property became subject to the son's will, and included in the general gift therein contained. The son must be deemed to have had the property": and he made a declaration that the son took the property but died intestate as to it, and that the son's heir-at-law was entitled.

In *Executors of Perry* v. *Reg.* (1) Robert Perry bequeathed his personal estate to his son Robert Cobbold Perry, who died in his father's lifetime; and it was held that the executors of the son were liable for probate duty on the amount of the bequest. Kelly C.B. says: "The legacy in this case, though in one sense it may be said to pass direct from Robert Perry to the legatee of Robert Cobbold Perry, still, in law, must be taken to pass through R. C. Perry, and forms part of the estate which his executors became possessed of under his will." This is a direct authority for the proposition that effect is to be given for the purposes of a taxing Act to the provisions of s. 33 of the Wills Act.

The same explanation of the effect of the enactment is found in numerous text-writers. For example, Lord St. Leonards, in his treatise on the New Statutes relating to Property (2nd ed. 1862, p. 393), when commenting on s. 33, says: "Under this provision . . . . the devisee or legatee, although he die in the lifetime of the testator himself, takes the property and may dispose of it by his will from his issue, who do not take by way of substitution." The late Mr. Hayes, in his Introduction to Conveyancing, 5th ed. 1840, p. 406, says: "The existence of issue of the devisee or legatee is, however, merely a collateral circumstance; for the property comprised in the devise or bequest is *not* given to such surviving issue, but is constituted part of the real or personal estate of the devisee or legatee, disposable by his or her will, and, if not so disposed of, trans-

(1) L. R. 4 Ex. 27.

missible to his or her real or personal representatives, unless intercepted by assignees in insolvency or bankruptcy": see also 1 Jarman on Wills, 4th ed. pp. 353, 354; Joshua Williams on the Law of Personal Property, 5th ed. 1864, p. 324.

The main contention on behalf of the appellants was that the meaning of s. 33 of the Wills Act is that, in the cases to which it applies, the will of the parent is to be read and construed as if it contained a clause providing that, in the event of a child's death, the property comprised in the gift to the child should go as if the child had died immediately after the testator; so that the property would not pass under the will of the child at all, but would pass directly under the will of the parent to the same persons as would have become entitled to it if the child had survived the parent. To this there are, in my opinion, three objections: (1.) It is based on a departure from the language of the Wills Act; (2.) it is not in accordance with the natural meaning of the actual language of the enactment; and (3.) it is at variance with the interpretation of that language found in the cases and in text-books of authority. This last consideration is one of great weight. It is, no doubt, of importance that every Act of Parliament, be it the Wills Act or the Finance Act, should be correctly interpreted; but it is also most important that a construction, which has for a long series of years been placed on an enactment which involves the title to real estate, should be adhered to. It is impossible to say what mischief might be done if it were now for the first time to be laid down that real estate to which s. 33 of the Wills Act applies does not pass under the will of a child, but does pass directly under that of the parent.

In the course of his able argument for the appellants Mr. Joseph Walton said more than once, and he appeared to attach importance to the observation, that the 33rd section of the Wills Act was based on a fiction, whereas the Finance Act dealt with facts; and it may be worth while to consider how far the element of fiction enters into the subject. The Finance Act imposes a duty on property over which a person has such a general power as would, if he were sui juris, enable him to dispose of the property. Whether in a particular case a person

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has or has not such a power is a question of law. In the case under consideration the law is to be ascertained from s. 33 of the Wills Act, which prescribes that in certain cases the legal effect of a will shall be ascertained as if a person who predeceased the testator had in fact survived him. For the purpose of ascertaining the effect, a hypothesis, or, if you will, a fiction, is introduced; but beyond this there is nothing fictitious. The effect when ascertained by the statutory rule laid down by the Legislature must in a Court of law be regarded as being no less a reality than if it were ascertained by the rules of the common law.

Mr. Walton also urged that John Scott, junior, was not at the time of his death competent in fact to dispose of this property, because his father was still alive, and could during his life deal with the property as he pleased, and might have revoked his will. It is undeniable that the father during his life was free to dispose of the property as he saw fit, either by revoking his will or otherwise. It is also undeniable that, if the father had in his lifetime seen fit to make another disposition of the property, any disposition made of it by the son would have been ineffectual. But why? Not from any want of competence on the part of the son to dispose of the property coming to him under the father's will, but because there would have been no property of the kind on which a disposition made by the son could operate—e.g., if the son had by will given to A. B. all the property coming to him under his father's will, such a gift would have been within his competence, but would have failed, if nothing ever came to the son under the father's will. For these reasons, I think the appeal ought to be dismissed.

Appeal dismissed.

Solicitors for petitioners: *Crawley, Arnold & Co.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

E. L.

[IN THE COURT OF APPEAL.]

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DANUBIAN SUGAR FACTORIES, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp Duty—Interest in "Property"—Sale of Benefit of Contract—Agreement with regard to Land situate out of United Kingdom—Property not situate out of United Kingdom—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 59, *sub-s.* 1.

By a contract dated January 25, 1899, a foreigner resident in Roumania undertook to transfer to F. or his nominees a certain quantity of land, suitable for the erection of a sugar factory, to be situated in a certain locality in Roumania, but the exact situation of which was to be selected by F. or his nominees; he further undertook to procure a certain quantity of land in the same locality, and to cultivate thereon in a certain manner beetroot, which he was to supply for the purposes of the sugar factory at fixed prices.

By an agreement under seal dated April 14, 1899, made in England, the benefit of the contract of January 25, 1899, was sold to an English company:—

Held, that the benefit of the contract of January 25, 1899, was "property" within the meaning of s. 59, sub-s. 1, of the Stamp Act, 1891, and that it was not within the exception therein contained as being "property locally situate out of the United Kingdom"; and that an ad valorem duty was therefore payable on the agreement of April 14, 1899.

APPEAL from the judgment of a Divisional Court (Ridley and Darling JJ.) upon a case stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891.

By an agreement under seal, dated April 14, 1899, made in England between the Roumanian Sugar Syndicate, Limited, of the one part and the Danubian Sugar Factories, Limited, of the other part, after a recital to the effect that the syndicate had obtained the benefit of an agreement dated January 25, 1899, made between Constantine George Vernescu of the one part and Robert Brown Fraser of the other part, and an undertaking from the said Constantine George Vernescu to transfer to the nominees of the syndicate a licence granted to him by the Roumanian Government for the erection of a sugar factory and the carrying on of the business of sugar manufacturers and refiners, the syndicate agreed to sell, transfer,

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and assign to the company the benefit of the thereinbefore-mentioned agreement of January 25, 1899, and the Government licence thereinbefore mentioned, and the company agreed to purchase the same. As the consideration for the sale and purchase as aforesaid, the company agreed within one month to allot to the syndicate or to its nominees 50,000 fully paid-up ordinary shares of 1*l.* each in the capital of the company. It was provided that the agreement should not convey or transfer, or be deemed to convey or transfer, any of the property or rights therein mentioned, but should only confer the right to specific performance or recovery of damages for breach thereof.

The effect of the agreement of January 25, 1899, was in substance as follows: it was agreed (1.) that Fraser should within three months from February 1, 1899, procure the registration in London under the Joint Stock Companies Acts of a company having for its object the manufacture and refining of sugar in Roumania; (2.) that Vernescu should, without any payment, cost, or expense, transfer to Fraser, his nominees, attorneys, or assigns not less than forty hectares of land, suitable for the erection of a sugar factory and refinery, which was to be situate within a radius of 1000 metres from the station of Tiganesti on the Alexandria-Zimnicea railway line, and the situation of which was to be selected by Fraser, his nominees, attorneys, or assigns; (3.) that, if by the law of Roumania Fraser, his nominees, attorneys, or assigns could not hold the land with the title of proprietor, then Vernescu should lease it to Fraser, his nominees, attorneys, or assigns for a term of at least twenty-nine years, beginning on May 1, 1899, at an annual rent of 40 francs per hectare, and the company should have the right to renew the contract at the expiration of the first period of twenty-nine years for a second period of the same duration; (4.) that Vernescu should assist the company, and the nominees, attorneys, or assigns of Fraser to obtain from the Government of Roumania the necessary permits and authorizations for the erection and working of the factory; (5.) that the company should erect on the land selected by them a suitable installation for the manufacture and refining of beet sugar; (6.) that during each year from 1899 to 1908, inclusive, Vernescu

should obtain possession of 1000 hectares of suitable land at Branceni or elsewhere, on which should be planted sugar beet-roots of the best quality from seed procured by the company, its nominees, attorneys, or assigns at current prices; that the beet should be cultivated and harvested in manner described by the agreement; and that the beetroots so produced and harvested should be sold to the company, its nominees, attorneys, or assigns, and delivered at their works in the manner, and should be paid for by them according to the scale of prices, specified in the agreement. The terms of the agreements of January 25, 1899, and April 14, 1899, are more fully set out in the judgment of Stirling L.J.

The Commissioners, being of opinion that the matters agreed to be sold by the agreement of April 14, 1899, were "property," and were not within any of the exceptions contained in s. 59, sub-s. 1, of the Stamp Act, 1891, assessed that agreement as liable to ad valorem conveyance duty at the rate of 10*s.* per cent. on the sum of 50,000*l.*

The questions for the Court were whether the agreement of April 14, 1899, was chargeable with the duty assessed by the Commissioners, or, if not, with what duty it was chargeable.

The Divisional Court held that the agreement was not chargeable with ad valorem duty, but only with the fixed duty of 10*s.* as a deed.

Dec. 7, 11. *Sir R. B. Finlay, A.-G.*, and *Rowlatt*, for the Crown. The agreement in question is a contract for the sale of an interest in "property" within s. 59, sub-s. 1, of the Stamp Act, 1891, and is not within the exception in respect of "property locally situate out of the United Kingdom." The agreement is for the sale of the benefit of the contract of January 25, 1899. That the benefit of a contract is "property" within the section is clear from many decisions, which shew that the term "property" as used therein is to be construed in the widest sense: see *Potter* v. *Inland Revenue Commissioners* (1); *West London Syndicate* v. *Inland Revenue Commissioners* (2); *Smelting Company of Australia* v. *Inland*

(1) (1854) 10 Ex. 147. (2) [1898] 2 Q. B. 507.

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Revenue Commissioners. (1) The agreement of January 25, 1899, did not give any interest in any particular land, but was a mere personal undertaking on the part of Vernescu to procure land in Roumania for the purposes of a sugar factory, and for the cultivation by him of beetroot to be supplied to the factory. The benefit of such an agreement cannot be said to be property locally situate out of the United Kingdom. In the case of *Smelting Company of Australia* v. *Inland Revenue Commissioners* (1), it was held that a patent, the operation of which was confined to the Colony of New South Wales, was not property locally situate out of the United Kingdom within the meaning of the exception in s. 59, sub-s. 1. This case is an a fortiori case as contrasted with that. A local situation cannot be attributed to a mere contractual right. The Court below thought that this case was governed by *Muller & Co.'s Margarine, Limited* v. *Inland Revenue Commissioners*. (2) It is submitted that that case is distinguishable. It was there held that goodwill attached to premises situate abroad was situate out of the United Kingdom. There is no analogy between such goodwill and a contractual right.

A. T. Lawrence, Q.C., and *William Wills*, for the Danubian Sugar Factories, Limited. The contract of January 25, 1899, gave to the syndicate through Fraser an option to take certain land, the exact situation of which was not fixed. Such an option is not an "equitable estate or interest in any property" within s. 59, sub-s. 1 (see *Muller & Co.'s Margarine, Limited* v. *Inland Revenue Commissioners* (2)), nor is it "an estate or interest in any property" within the sub-section. The interest under the contract is merely in the services of Vernescu and the doing of certain acts by him for the attainment of certain objects. That is not an interest in "property." There cannot be a sale or assignment of a contract as "property" in any proper sense of the term. There may no doubt be a sale or assignment of a fund arising under a contract, or of any such subject-matter existing under a contract, but in such a case there is a res capable of being the subject of sale or assignment in the proper sense of the term. If the benefit of a contract

(1) [1897] 1 Q. B. 175. (2) [1900] 1 Q. B. 310.

is "property" within the section, then ad valorem duty will be payable on the sale of the benefit of a contract not itself subject to ad valorem duty, which cannot have been intended. There cannot be a sale of an "agreement of minds" or the right to personal services under a contract. The legal effect of a transfer of the benefit of a contract is merely that it amounts to an agreement to allow the transferee to use the name of the transferor for the purpose of enforcing the contract. That is not a right which can be correctly described by the word "property." The scope of the 59th section is not to enlarge the meaning of the word "property," but to deal with cases where the parties dispense with an actual conveyance of property in specie and are content to rely on the equitable interest created by the contract of sale; but there cannot in any proper sense be a conveyance of the benefit of a contract for services. If the benefit of the contract of January 25, 1899, was property, then it was within the exception of "property locally situate out of the United Kingdom." The contract related to land in Roumania, and Vernescu was a foreigner resident abroad. A "patent" may be said to be incapable of locality. But the benefit of a contract relating to land situate abroad may be said to be situate out of the United Kingdom, just as in *Muller & Co.'s Margarine, Limited* v. *Inland Revenue Commissioners* (1) the goodwill attached to premises situate abroad was held to be situate out of the United Kingdom.

Rowlatt, in reply.

Cur. adv. vult.

Dec. 20. A. L. SMITH M.R. read the following judgment:—I have had the opportunity of reading the judgment which my brother Stirling is about to deliver, and I agree with it; for I cannot distinguish the present case from that of *Smelting Company of Australia* v. *Inland Revenue Commissioners* (2), in which this Court held that an agreement for the sale of a licence to use an Australian patent, i.e., of the benefit of a contract, was not an agreement for the sale of property locally situated out of the United Kingdom. It is true

(1) [1900] 1 Q. B. 310. (2) [1897] 1 Q. B. 175.

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that in *Muller & Co.'s Margarine, Limited* v. *Inland Revenue Commissioners* (1) we held in this Court that goodwill, which was attached to a manufactory situated abroad, was property locally situated out of the United Kingdom, and therefore not within s. 59 of the Stamp Act, 1891; but we did not, nor indeed could we, dissent from the case of *Smelting Company of Australia* v. *Inland Revenue Commissioners* (2), theretofore decided, for we were bound by it. The learned judges in the Queen's Bench Division were of opinion that the case of *Muller & Co.'s Margarine, Limited* v. *Inland Revenue Commissioners* (1) decided the present, but in my opinion it did not; for the sale of a goodwill attached to premises abroad is very different from the sale of merely the benefit of a contract, which is the present case. I think that this case falls within the decision in *Smelting Company of Australia* v. *Inland Revenue Commissioners* (2), and not within that in *Muller & Co.'s Margarine, Limited* v. *Inland Revenue Commissioners*. (1) For this reason—i.e., that the present case falls within *Smelting Company of Australia* v. *Inland Revenue Commissioners* (2), and not within *Muller & Co.'s Margarine, Limited* v. *Inland Revenue Commissioners* (1)—and for this alone, I am of opinion that the appeal must be allowed; for, while the benefit of the contract of January 25, 1899, is, I think, "property," and therefore comes within the enacting part of the section, it is not within the exception therein, as being property locally situated out of the United Kingdom. I think this appeal by the Crown must be allowed.

COLLINS L.J. I am of the same opinion. I have had an opportunity of reading the judgment of my brother Stirling, and I agree with it. It appears to me impossible for us to hold otherwise than that the benefit of a contract is "property" within the terms of s. 59, sub-s. 1, of the Stamp Act, 1891; for I think that has in effect been decided by a series of decisions, of which the first is *Potter* v. *Inland Revenue Commissioners* (3) and the last *West London Syndicate* v. *Inland*

(1) [1900] 1 Q. B. 310. (2) [1897] 1 Q. B. 175.
(3) 10 Ex. 147.

Revenue Commissioners (1), in which it was decided that the goodwill of premises, apart from the premises, was itself property. The only further observations which I wish to make are with regard to the effect of the decision in *Muller & Co.'s Margarine, Limited* v. *Inland Revenue Commissioners* (2), which the judges in the Court below seem to have thought to be a conclusive authority against the Crown in the present case. In my judgment, so far from being an authority against the Crown, it is really in favour of the Crown. The judges below based their view on some observations of the Master of the Rolls and my own in that case; but, I think, when the facts of the case are looked at, it is clear that the point as to whether the benefit of a contract is property within s. 59, sub-s. 1, of the Stamp Act, 1891, did not arise at all. The way in which the question in that case arose was as follows: A man named Muller was selling to an English company the goodwill of his business and certain other things. That sale had been brought about through the assistance of certain intermediaries, one of whom had acquired from the vendor the option of purchasing the business. The facts as to the position of these intermediaries were recited in the agreement in question; but what was sold by the agreement, and what was material to consider for the purposes of the case, was the goodwill of the business, and, as ancillary thereto, the right to the benefit of certain contracts. Two matters only were made the subject of discussion before, and considered by this Court in that case, namely, the matters mentioned in clause 1 and in clause 5 of the agreement; that is to say, the goodwill of the business, and the pending contracts, engagements, and orders in connection with the business. With reference to those we all thought that the sale was by Muller, though the intermediaries were made parties to the agreement, and that the sale was of the goodwill of the business, and not of an option to purchase it. As I have said, one of the intermediaries had acquired the option of purchasing the business, but the subject-matter which, by the terms of the agreement, the vendor, by the direction of the parties

(1) [1898] 2 Q. B. 507. (2) [1900] 1 Q. B. 310.

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of the second and third part, and the parties of the fourth part agreed to sell, and the company to purchase, was the goodwill of the business. Whatever right the parties joining in the sale may have had, what they agreed to sell was the goodwill. There was no sale of an option to purchase. The question was raised whether the parties of the fourth part—i.e., the syndicate, who purported to join in selling, had what amounted to an equitable estate or interest, so as to let in the operation of the section. It is with reference to what was said on that subject that the judges in the Court below seem to have fallen into a misconception. What the Court was there considering was whether there was a sale of an equitable estate or interest. We came to the conclusion that, assuming the syndicate to be vendors of an option, what they sold being only an option to purchase property at a particular price, there was not a sale of an equitable estate or interest. That was all that we had to decide in that case. We did not decide that there was a sale of an option, but that, even if there were, it was not a sale of an equitable estate or interest within the section. This did not involve any decision of the question whether a sale of a person's interest under an option would not be a sale of "property." Having decided that there was no sale of an equitable estate or interest, we proceeded to consider the main question, namely, whether the sale of the goodwill of the business, and of the contracts incident thereto, though primâ facie a sale of property, was taken out of the provisions of the first part of the section by reason of its being within the exception in respect of "property locally situate out of the United Kingdom." With regard to that question we thought that, though the goodwill of the business, and the contracts incident thereto, were clearly property, they came within the exception; because, as property annexed to the factory which was locally situated out of the United Kingdom, the goodwill itself and its incidents were locally situate out of the United Kingdom. So that really our decision involved the view that the goodwill and the contracts incidental thereto were property within the section, and that the agreement for sale of them would have been liable to the duty but for the

fact that we came to the conclusion that they were within the exception. It seems to me impossible, having regard to the decision in *Smelting Company of Australia* v. *Inland Revenue Commissioners* (1), which appears to me directly in point, to hold that the property in the present case was situate out of the United Kingdom.

STIRLING L.J. read the following judgment:—The question in this case is whether an agreement dated April 14, 1899, and made between the Roumanian Sugar Syndicate (hereafter called the syndicate) of the one part and the Danubian Sugar Factories (hereafter called the company) of the other part, is chargeable with ad valorem stamp duty under s. 59, sub-s. 1, of the Stamp Act, 1891. The Commissioners of Inland Revenue were of opinion that the agreement was liable to be so stamped, and assessed the duty accordingly. Thereupon at the request of the company the Commissioners stated a case for the opinion of the Queen's Bench Division on the question. A Divisional Court, consisting of Ridley J. and Darling J., has held that the agreement is not liable to ad valorem duty; and from this decision an appeal is brought by the Crown.

By the agreement in question the syndicate agrees to sell to the company the benefit of certain agreements and licences therein referred to, and in particular of an agreement of January 25, 1899, and a licence granted by the Government of Roumania to one Constantine George Vernescu of Bucharest, and the company agrees to purchase the same, and to undertake all liabilities and engagements entered into by the syndicate in respect of the same. The consideration for the sale was to be the issue and allotment to the syndicate or to its nominees of 50,000 ordinary shares of 1*l.* each in the capital of the company.

The agreement of January 25, 1899, was made between Constantine George Vernescu, personally, and in his quality of mandator of his father George D. Vernescu under a special power of attorney, of the one part, and Robert Brown Fraser of the other part. By clause 1 Fraser agreed to cause to be

(1) [1897] 1 Q. B. 175.

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registered in London within three months from February 1, 1899, a company to be formed under the provisions of the Joint Stock Companies Acts, having for its object, amongst others, the manufacture and refining of sugar in Roumania. By clause 2 Constantine George Vernescu agreed, without any payment, cost, or expense, to transfer to Fraser, his nominees, attorneys, or assigns not less than forty hectares of land, suitable for the erection of a sugar factory and refinery, or for any other purpose in connection therewith, which land was to be situate within a radius of 1000 metres from the station of Tiganesti on the Alexandria-Zimnicea railway line. Such land was to be a single plot, and to have a sufficient frontage and access to the railway and the Vedea river; and the situation was to be selected by Fraser or his nominees, attorneys, or assigns. Clause 3 provided that, if by the law of Roumania Fraser, his nominees, attorneys, or assigns might not hold the said land with the title of proprietor, then Constantine George Vernescu should lease to Fraser, his nominees, attorneys, or assigns the said land for a term of at least twenty-nine years, beginning on May 1, 1899, at an annual rental of 40 francs per hectare with a right of renewal. By clause 4 Constantine George Vernescu agreed to do all in his power to assist the company and the nominees, attorneys, or assigns of Fraser to obtain from the Government of Roumania all necessary permits and authorizations to erect and work sugar factories at Branceni, and by clause 5 it was agreed that the company should erect on the land selected by them a suitable installation for the manufacture and refining of beet sugar. By clause 6 Constantine George Vernescu agreed during each year from 1899 to 1908, inclusive, to obtain possession of 1000 hectares of land at Branceni, on which should be planted sugar beetroots of the best quality, to be cultivated according to the best and most scientific methods, and so as to secure the best possible crops during the summers or autumns of the years 1900 to 1909, inclusive; and it was agreed that all the beetroots produced and harvested in this manner should be sold to the company and delivered at the works of the company during the months of September and October in each year as the beets were

harvested. The prices to be paid by the company were fixed, and it was stipulated that, in case Constantine George Vernescu should require artificial fertilizers for the land cultivated by him for the production of beetroots, he should purchase the same from the company at cost price. By clause 7 Constantine George Vernescu agreed to receive payment of the first sum of 20,000*l.*, which should become due to him for beetroot, in fully paid-up shares of the company; and by clause 8 it was agreed that the company should have a lien upon the shares so allotted to him for the due performance of the contract. By clause 9 Constantine George Vernescu agreed that he should not be at liberty during the continuance of the contract to make any other convention of the same nature with regard to the procuring of beetroots, or for the establishment of works for the manufacture of beetroot sugar on or in the vicinity of his properties at Branceni. By clause 10 Fraser undertook to make during the period of four months from February 1, 1899, the necessary investigations for the plans of the factory and so forth; and it was provided that, if the result of those investigations should not be satisfactory, Fraser reserved to himself the right to modify the contract or to renounce the undertaking. Clause 11 provided that Fraser should be entitled at any time to cede the rights accruing to him by virtue of the contract to any person, society, or joint stock company, and that immediately on such cession being executed and bonâ fide accepted by the assignee, Fraser should be relieved of all engagements taken by this contract. By clause 12 it was specially stipulated that upon the forty hectares of land leased for the erection of the sugar factory and refinery, the lessee or his assigns should not be at liberty to carry on other commerce or industry except that of sugar in all its forms, and treating and selling the by-products of this factory.

It may be inferred from the language of this agreement, though it is not directly expressed, that Constantine George Vernescu was the proprietor of land in the neighbourhood of Branceni. The benefits intended to be secured to the proposed company were, in the first place, the transfer or lease by

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Vernescu to it of a piece of land in Roumania, forty hectares in extent, lying within a defined area and to be selected by Fraser or his nominees, for the erection of a sugar factory; and, secondly, the planting and cultivation by Vernescu of beet-roots on 1000 hectares of land in the same country, which roots were to be supplied to the company at stipulated prices. The licence is dated March 10, 1899, and contains an authorization to build a factory and refinery for beetroot sugar to Constantine George Vernescu on the estate Branceni.

I understand that the syndicate is a company formed by Fraser in accordance with clause 1 of the agreement of January 25, 1899, and that by virtue of clause 11 of the same agreement, or otherwise, the syndicate has become *legally* entitled to stand in the place of Fraser as a contracting party to that agreement, and to enforce it *at law* as against Constantine George Vernescu.

There is no evidence as to what the effect of that agreement is according to the law of Roumania. It is not one of which, in my opinion, specific performance could be enforced according to the law of this country. It is a well-established rule that the Court does not grant specific performance of a contract, unless it can give full relief under it. Now, part of the contract by Vernescu is that he will plant and cultivate according to the most approved mode beetroots on 1000 hectares of land in Roumania. To carry this into execution would require constant superintendence on the part of the Court; and this the Court always declines to give: see *Blackett* v. *Bates* (1); *Powell Duffryn Steam Coal Co.* v. *Taff Vale Ry. Co.* (2) It, therefore, appears to me that the agreement merely imposes on Constantine George Vernescu a personal liability to do certain things for the benefit of the syndicate within a specified area in Roumania.

Sect. 59 of the Stamp Act, 1891, provides (sub-s. 1) as follows: "Any contract or agreement made in England . . . . under seal . . . . for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property, except lands, tenements, hereditaments, or

(1) (1865) L. R. 1 Ch. 117. (2) (1874) L. R. 9 Ch. 331.

heritages, or property locally situate out of the United Kingdom, or goods, wares, or merchandise, or stock, or marketable securities, or any ship or vessel, or part interest, share, or property of or in any ship or vessel, shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold."

The stamp duty is not claimed on the ground that the instrument of April 14, 1899, is a contract or agreement for the sale of an *equitable* estate or interest in any property; on the contrary, it was admitted that the estate or interest contracted to be sold was a legal estate or interest in the syndicate. The contention was that the benefit of the contract of January 25, 1899, and of the licence was "property" within the meaning of s. 59, and that such "property" did not fall within any of the exceptions therein mentioned; and in particular was not "property locally situate out of the United Kingdom."

In the expression "sale of any estate or interest in any property," the word "property" is of wide import. This is shewn by the extent of the exceptions which follow. Further, it was held by this Court in *West London Syndicate* v. *Inland Revenue Commissioners* (1), following previous decisions under the Stamp Acts, and particularly *Potter* v. *Inland Revenue Commissioners* (2), that goodwill is property within the meaning of the section. Now, on the sale of a business as a going concern, it is usual to include, not only the goodwill, but also the benefit of the subsisting contracts. That benefit is in many cases a most valuable asset, and is in my judgment "property" within the meaning of s. 59 of the Stamp Act no less than goodwill. I think, therefore, that the benefit of the agreement of January 25, 1899, is "property" within the words "sale of any estate or interest in any property." It was urged, however, that, if no limitation be placed on the meaning of the word "property," ad valorem stamp duty would be chargeable on a contract for the sale of the benefit of another contract which was not liable to ad valorem duty, as for example a contract

(1) [1898] 2 Q. B. 507. (2) 10 Ex. 147.

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for the sale of marketable securities, and it was said, with some force, that this could not have been the intention of the Legislature. It might be thought that the object of s. 59 was only to prevent the loss of duty in cases where the parties were content to dispense with an actual conveyance of the property agreed to be sold, and that its operation ought to be limited to cases where such a loss would occur. An argument based on this view of the section was put forward in *Smelting Company of Australia* v. *Inland Revenue Commissioners* (1), the facts in which were remarkable. The agreement for sale in that case included a licence to use in a particular district of New South Wales a patent granted in that colony, and also a half-share of the patent itself. It appeared that by the statutes of New South Wales the patent, and any assignment or dealing with it, required to be registered in New South Wales. By an indenture executed in Australia the benefit of the licence and the share of the patent were assigned to the purchasers; and this indenture was stamped according to the law of New South Wales. Yet it was held by the Court (Lord Esher M.R., Lopes L.J. and Rigby L.J.) that the agreement for sale was chargeable with ad valorem duty under the Stamp Act, 1891. In the face of this decision I am unable to see that any such limitation is to be placed on the word "property," and I think the duty is chargeable unless the case is brought within one of the specified exceptions.

The exception relied on in argument was "property locally situate out of the United Kingdom." The property in question is the benefit of the contract of January 25, 1899, which confers, in my view of it, a personal right as against Constantine George Vernescu (who appears to be resident in Roumania) to performance by him of certain acts within that country. It does not appear whether according to the law of Roumania anything can be done in this country by the syndicate for the purpose of placing the purchasers, the company, in legal relations with Constantine George Vernescu; and according to the law of this country I apprehend that all that could be done would be the execution of a formal assignment or declara-

(1) [1897] 1 Q. B. 175.

tion of trust to or in favour of the purchasers, accompanied by a grant of a power of attorney enabling the purchasers in the name of the vendors to take all steps necessary for the enforcement of the right vested in them. An assignment would only pass the legal right, if it fell within the provisions of s. 25, sub-s. 6, of the Judicature Act, 1873. In the case already referred to of the *Smelting Company of Australia* v. *Inland Revenue Commissioners* (1), it was held that a share of an Australian patent was not property locally situate out of the United Kingdom, although the title to it required to be perfected according to Australian law, and although the rights conferred by the patent could only be enforced within the Colony which granted it. In *Muller & Co.'s Margarine, Limited* v. *Inland Revenue Commissioners* (2), it was held that goodwill attached to a manufactory situate in a foreign country was "property locally situate out of the United Kingdom." In the present case the subject-matter of the agreement is a personal right against a person resident abroad; but the former of these two cases shews that such a right is, nevertheless, not locally situate out of the United Kingdom. The right is also to have certain acts done with reference to land situate in a foreign country. Still, it is a mere personal right; and it does not appear to me that it is so attached to land as to give it a local situation and thus bring it within the decision in *Muller & Co.'s Margarine, Limited* v. *Inland Revenue Commissioners*. (2) In my opinion the appeal ought to be allowed.

Appeal allowed.

Solicitors for Danubian Sugar Factories, Limited: *Burton, Yeates & Hart, for Alexander Wilson & Cowie, Liverpool.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

(1) [1897] 1 Q. B. 175. (2) [1900] 1 Q. B. 310.

E. L.

1900
Nov. 19.

In re CLEMENTS.
Ex parte CLEMENTS.

Bankruptcy—Act of Bankruptcy—Bankruptcy Notice—Person entitled to enforce a Final Judgment—Trustee in Bankruptcy of Judgment Creditor—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 1—*Order* XVII., *r.* 4; *Order* XLII., *r.* 23.

The trustee in bankruptcy of a judgment creditor, who has obtained an order under Order XVII., r. 4, making him a party to the action, but has not obtained leave to issue execution under Order XLII., r. 23, is not "a person who is for the time being entitled to enforce a final judgment" within the meaning of s. 1 of the Bankruptcy Act, 1890, and is therefore not entitled to issue a bankruptcy notice against the judgment debtor in respect of the judgment debt.

APPEAL from an order of the deputy registrar of the Croydon County Court dismissing an application to set aside a bankruptcy notice. The facts were shortly as follows.

In July, 1899, a firm of Spencer & Co. recovered judgment against Clements, the appellant, for 900*l.* and costs in an action in the High Court. In March, 1900, a receiving order was made against Spencer & Co., who were subsequently adjudicated bankrupts, the respondent, Davis, being appointed the trustee in their bankruptcy. On April 12, 1900, an order was made upon an application by Davis under Order XVII., r. 4, that Davis should be joined as a party to the action of *Spencer & Co.* v. *Clements*, and that all further proceedings should be carried on between the added party and the defendant. On April 28, 1900, Davis issued a bankruptcy notice, which was duly served upon Clements, in which he claimed payment of a sum of 400*l.*, the balance of the judgment debt and costs then owing, and Clements applied to have the bankruptcy notice set aside on the ground that Davis, not having obtained an order declaring him to be entitled to issue execution, was not a person entitled to enforce a final judgment within the meaning of s. 1 of the Bankruptcy Act, 1890, and was therefore not

entitled to issue a bankruptcy notice. The application having been dismissed, Clements appealed. (1)

Willoughby Williams, for the appellant. The respondent was not entitled to issue the bankruptcy notice. It is true that under Order XVII., r. 4 (2), he had been made a party to the action, but that was not in itself sufficient. The provisions of s. 1 of the Bankruptcy Act, 1890, under which alone a person in the position of the respondent can have any right to issue a bankruptcy notice, apply in terms only to a person who is entitled for the time being to enforce a final judgment. There had been a change in the parties entitled to execution within the meaning of Order XLII., r. 23, and, therefore, under that rule the respondent was bound to obtain leave to issue execution, which he never did; not being entitled to issue execution, he was equally not entitled to issue a bankruptcy notice. The case of *Ex parte Woodall, In re Woodall* (3), though decided

(1) Various points upon the merits were taken in the notice of appeal and were relied upon in the argument, but, as no judgment was given upon them, it is unnecessary to further allude to them in this report.

(2) By Order XVII., r. 4, "Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of a cause or matter, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained ex parte on application to the Court or a judge, upon an allegation of such change, or transmission of interest or liability, or of such person interested having come into existence."

By Order XLII, r. 23, "In the following cases, viz.: (*a*) Where six years have elapsed since the judgment or date of the order, or any change has taken place by death or otherwise in the parties entitled or liable to execution; . . . . the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly. And such Court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or judge may impose such terms as to costs or otherwise as shall be just."

(3) (1884) 13 Q. B. D. 479.

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CLEMENTS, *In re.* CLEMENTS. *Ex parte.*

before the Bankruptcy Act, 1890, applies to the extent that, where there has been a change in the parties, leave to issue execution must be obtained under Order XLII., r. 23, before a bankruptcy notice can be issued.

Herbert Reed, Q.C., and *Frank Mellor*, for the respondent. The order was right. Order XVII., r. 4, is a general order giving power in certain specified cases only to add a party to an action as plaintiff, and when that is done the party so added does not require leave to issue execution under Order XLII., r. 23, which only applies where the person requiring leave has not been made a party to the action; the added plaintiff is in a position to issue execution until the defendant moves to discharge the order under Order XVII., r. 4, by which he was added. There is nothing in Order XVII., r. 4, to limit its operation to proceedings before judgment.

[WRIGHT J. referred to *Norburn* v. *Norburn*. (1)]

The real point decided in that case was that asking for the appointment of a receiver was not asking for leave to issue execution within Order XLII., r. 23; besides, the executors had in that case taken no steps to be made parties under Order XVII., r. 4.

Willoughby Williams, in reply.

WRIGHT J. I am of opinion that this appeal should be allowed. Under the Act of 1883 it was not possible for the trustee in bankruptcy of a judgment creditor to serve a valid bankruptcy notice on the judgment debtor; the case of *In re Goldring, Ex parte Harper* (2), is an express authority of the Court of Appeal to that effect, although in *Ex parte Woodall, In re Woodall* (3), that Court held that the personal representative of a judgment creditor could issue execution and also a bankruptcy notice although he had not been joined as a party to the proceedings under Order XVII., provided he had obtained leave under Order XLII., r. 23, to issue execution on the judgment. Then came the Act of 1890, which says in s. 1: "Any person who is for the time being entitled to enforce a final

(1) [1894] 1 Q. B. 448. (2) (1888) 22 Q. B. D. 87.
(3) 13 Q. B. D. 479.

judgment shall be deemed a creditor who has obtained a final judgment within the meaning of s. 4 of the principal Act." That is no doubt a difficult section to work out, but upon its true construction I think it comes to this. I do not think that the trustee in bankruptcy of the judgment creditor is entitled to apply under Order XLII. for leave to issue execution unless he has first been made a party to the proceedings under Order XVII. Order XLII. assumes that there is a right to issue execution, and, therefore, nothing can be done under that order until the trustee has been added as a party. In the present case the trustee was added as a party under Order XVII., and he is now, and during all material times has been, a party to the proceedings; but he has never obtained express leave under Order XLII., s. 23, to issue execution. I think that he must obtain that leave. The rule contains no negative words, but it seems to say that, as a change has been made in the parties entitled to issue execution, no execution shall issue without special leave. And it is to be remarked that under the rule the Court has a discretion as to granting leave for execution to issue. In the present case I think the Court might give the trustee leave on an ex parte application; but if the debtor (I mean the appellant) were to apply to set it aside, the question upon the facts would have to be determined upon argument, and the Court might exercise its discretion and see whether the counter-claim was good. In my opinion it would be highly unjust to make a man a bankrupt without any inquiry as to whether there is any substance in the counter-claim which he sets up. The trustee can still apply under Order XLII., r. 23, for leave to issue execution, and if he gets it, the question of the counter-claim and the bankruptcy notice can be gone into. At present I think there is no power to issue a bankruptcy notice; s. 1 of the Act of 1890 speaks of the person entitled to enforce a final judgment, by which it means a person who, though he has not himself obtained the judgment, has taken all the steps which entitle him to reap the fruits of that judgment. As to the merits, which have been argued at some length before us, I prefer to express no opinion.

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CLEMENTS, *In re.*
CLEMENTS, *Ex parte.*

PHILLIMORE J. I am of the same opinion for the same reasons.

Appeal allowed.

Solicitors for appellant: *Herbert Reeves & Co.*
Solicitors for respondent: *Lindus & Hortin.*

W. J. B.

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Nov. 15.

THE VESTRY OF ST. JAMES AND ST. JOHN, CLERKENWELL *v.* EDMONDSON & SON.

Metropolis—Management Acts—New Street—Sewer—Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *ss.* 52, 53.

An old highway about a thousand yards long formed the boundary between the parish of Clerkenwell, in the county of London, and the parish of Hornsey, in the county of Middlesex, the boundary line running down the centre of the highway. Prior to the coming into operation of the Metropolis Management Act, 1855, houses had been built along the Hornsey side of the highway for nearly its whole length, but on the Clerkenwell side there were only a few scattered buildings. In recent years the frontage on the Clerkenwell side had also been covered with buildings, and in 1898 the Clerkenwell Vestry laid down a sewer under their portion of the highway for the purpose of draining the houses on that side, and apportioned the expenses amongst the frontagers on that side of the highway. Upon the hearing of a summons under s. 52 of the Metropolis Management Act, 1862, against one of the frontagers for recovery of the apportioned amount of the expenses, the justices found that the highway taken as a whole was sufficiently built upon to be a street before the Metropolis Management Act, 1855, came into operation, and held that the Clerkenwell portion of the lane could not be dealt with by itself for the purpose of determining whether it was a new street; they therefore dismissed the summons:—

Held, that, having regard to their finding of fact that the whole highway had become a street in 1855, the justices were right in holding that they were precluded from looking at the Clerkenwell portion as a street by itself, and from determining whether it had become a new street since that date.

CASE stated by justices of the county of London sitting at Highgate, which was in substance as follows:—

A complaint had been preferred by the appellants under the Metropolis Management Act, 1862, against the respondents,

stating that the appellants during the years 1897 and 1898, in accordance with the provisions in that behalf of the Metropolis Management Acts, executed or caused to be executed certain works, to wit, the construction of a sewer and the works appertaining thereto, including the cost of gullies, side entrances, lengths of sewer at the intersection of streets, with the necessary manholes and inspection chambers and other incidental charges and expenses under the said Acts, in or in part of a new street known as Colney Hatch Lane for or in respect of certain premises in the said street of which the respondents were the owners, and that the appellants had thereby incurred expenses of which the amounts apportioned in respect of the respondents' premises were 130*l.* 6*s.* 8*d.* and 7*l.* 2*s.* 10*d.* respectively, and that the respondents had not paid the said sums nor any part thereof.

Colney Hatch Lane was an old highway forming the boundary between a detached portion of the parish of St. James and St. John, Clerkenwell, in the county of London, and the parish and urban district of Hornsey, in the county of Middlesex. The actual boundary was nearly in the centre of the lane, but the greater part of the surface was within the parish of Clerkenwell.

Before the year 1856, when the first of the Metropolis Management Acts (18 & 19 Vict. c. 120) came into operation, buildings had been erected on the Hornsey or Middlesex side of the lane along nearly the whole of its length, but on the Clerkenwell or London side of the lane there were at that time only about seven or eight buildings at various points. The entire length of the lane was 2993 feet, and the character and extent of the buildings was shewn on the ordnance map published in 1862. Since the year 1856, and more particularly within the last few years, the remainder of the Clerkenwell or London side had been laid out for building, and the greater part of the frontage to the lane was now covered with buildings.

In or about the year 1887 the Hornsey Local Board laid a sewer on their side of the lane for the drainage of the houses in their district. By agreement between that board and the

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appellants, two of the houses on the Clerkenwell side were drained into such sewer until the sewer in dispute was constructed; and by agreement between the same board and the owners of two other houses on the Clerkenwell side, those owners connected their drains with the Hornsey sewer. The sums paid by such owners to the Hornsey Local Board under the said agreements were repaid to them by the appellants when their drains were connected with the sewer in dispute. On the Clerkenwell side of the lane there was no sewer of any kind save a surface-water sewer which had been laid for the drainage of the road itself, partly by the owners of adjoining land and partly by the appellants, and for a short distance an old brick sewer running obliquely across the lane and taking the drainage of three or four of the houses on that side. The old houses at the south end of the lane on the Clerkenwell side were drained into a sewer behind these houses running into another parish.

The part of the parish of Clerkenwell which comprised the eastern side of Colney Hatch Lane was wholly detached from the rest of the parish, and was entirely surrounded by the county of Middlesex. For this reason it was found to be impracticable to provide an outlet into the metropolitan main drainage system from this part of the parish. By the Metropolitan Board of Works (Various Powers) Act, 1887, s. 44, the Metropolitan Board of Works (now the London County Council) were enabled by agreement with the local authorities of certain adjoining districts, or any of them, to cause any sewer or sewers constructed or to be constructed by such Board in the said detached portion of Clerkenwell to communicate with the sewers of one or more of such authorities, and an agreement for this purpose was made in the year 1896 by the London County Council with the Friern Barnet Urban District Council, and an outlet for the sewage of the said detached part of Clerkenwell into a sewer of the London County Council, and thence into the Friern Barnet sewers, was provided in pursuance of the said agreement in the year 1897. As soon as such outlet was provided, the appellants laid the sewer which was the subject of this case for the drainage of the houses and

buildings which then were or might thereafter be erected on the Clerkenwell or London side of the lane, and such sewer was completed in the year 1898.

The total cost of the sewer and the works appertaining thereto was 1106*l.* 14*s.* 5*d.*, of which the appellants charged to sewer rates 103*l.* 7*s.* 3*d.*, and apportioned the balance among the owners of the premises on the Clerkenwell side of the lane according to the frontage of their respective premises. The amounts apportioned in respect of the respondents' premises were 130*l.* 6*s.* 8*d.* and 7*l.* 2*s.* 10*d.* respectively. These sums were duly demanded, and, the respondents having refused to pay them, a complaint was preferred as above mentioned under the Metropolis Management Act, 1862, ss. 52, 53.

It was contended at the hearing that so much of Colney Hatch Lane as is within the parish of Clerkenwell was a new street within the meaning of the Metropolis Management Acts, and that it had become a new street by reason of the erection of buildings fronting it as above mentioned; that in order to determine whether it had become a new street no regard could be had to the portion of the lane in the parish of Hornsey or to the buildings on the Hornsey side, these being in a different parish district and county, and subject to entirely different statutes.

It was contended on behalf of the respondents that Colney Hatch Lane taken as a whole had become a street in the ordinary sense of the term by reason of the buildings erected along it before the year 1856, and was an old street when the Metropolis Management Act, 1855, came into operation, that no part of such street could become a new street subsequently by reason of the erection of additional buildings along it, and that the portion of the lane which was in Clerkenwell could not be dealt with by itself without regard to the portion which was in Hornsey, or to the buildings on the Hornsey side, for the purpose of determining whether it was a new street within the meaning of the Metropolis Management Acts.

The justices found that Colney Hatch Lane taken as a whole was sufficiently built upon to be a street before the Metropolis Management Act, 1855, came into operation, and were of

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opinion that that portion of the lane which was in Clerkenwell could not be dealt with by itself for the purpose of determining whether it was a new street, and for those reasons they dismissed the summonses.

The question for the opinion of the Court was whether that portion of Colney Hatch Lane which was in Clerkenwell could be dealt with by itself without regard to the portion which was in Hornsey, or to the buildings on the Hornsey side, for the purpose of determining whether it was a new street.

Macmorran, Q.C. (*C. F. Pritchard* with him), for the appellants. The justices were wrong. They have assumed that this lane must necessarily be treated as a whole, and have found that, regarded as a whole, it had acquired the character of a street before the Metropolis Management Acts came into operation. But the lane cannot properly be looked at as a whole, for part of it was outside the jurisdiction of the appellants. It may be that for many purposes it satisfied the statutory definition of a street, but it was not a street within the ordinary acceptation of that term until houses were built on the Clerkenwell side, when it became a street in a new sense: *Pound* v. *Plumstead Board of Works* (1), and the part within the appellants' jurisdiction became capable of being treated as a new street. There is nothing to prevent that portion in width of the lane which lies upon the appellants' side of the boundary from being treated as a new street. *Richards* v. *Kessick* (2) is an authority to shew that the portion of a road along which houses are built may be considered by itself, and may be dealt with as a street, and if necessary as a new street, although the remainder in width of the highway is repairable by the inhabitants at large.

[LORD ALVERSTONE C.J. The difficulty in your way is that the justices have found as a fact that this was a street in 1855.]

That finding must mean that it was a street for the purpose of the definition of "street" in the Metropolis Management Acts, and not that it was a street in the ordinary acceptation of the word; such a finding does not prevent the Clerkenwell

(1) (1871) L. R. 7 Q. B. 183. (2) (1888) 57 L. J. (M.C.) 48.

side of the lane becoming a new street when houses were erected along the side of it. The appellants made this sewer for the benefit of that part of the lane which was within their jurisdiction. Why should they not do with the part that which they could have done with the whole of the lane if it had been within their jurisdiction, and treat it as a new street?

Alexander Glen, for the respondents. The justices were right. The question whether a particular road is a street for the purposes of these acts is one of the physical, visible character of the place, and the physical condition necessary to give this lane the character of a street is found to have existed in 1856, and was not acquired recently. The appellants' half of the lane is the old half of an old street, and it cannot acquire the character of a street again. In *Richards* v. *Kessick* (1) and in *White* v. *Fulham Vestry* (2) the element of newness had come into existence since the Act of Parliament had came into operation, and there was no finding that prior to that date the road had acquired the character of a street. [He also cited *Fulham Board* v. *Goodwin*. (3)]

Macmorran, Q.C., in reply.

Cur. adv. vult.

Nov. 16. LORD ALVERSTONE C.J. This is an appeal from a decision of the justices of the county of London sitting at Highgate on summonses to enforce the payment of two sums of 130*l.* odd and 7*l.* odd, portions of the expense of making a certain sewer in Colney Hatch Lane, which had been charged upon the respondents as frontagers. The facts are, and are so found in this case, that Colney Hatch Lane is an old highway forming a boundary between a detached portion of the parish of St. James and St. John, Clerkenwell, in the county of London, and the parish and urban district of Hornsey, in the county of Middlesex. The actual boundary is nearly in the centre of the lane, but the greater part of the surface is within the parish of Clerkenwell. The case then goes on to state

(1) 57 L. J. (M.C.) 48. (2) (1896) 74 L. T. 425.
(3) (1876) 1 Ex. D. 400.

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that before the year 1856, when the first of the Metropolis Management Acts (18 & 19 Vict. c. 120) came into operation, buildings had been erected on the Hornsey or Middlesex side of the lane along nearly the whole of its length, but on the Clerkenwell side of the lane there were at that time only about seven or eight buildings at various points. The case then states the facts as to the construction of the sewer, and the justices, having stated the facts which gave rise to this claim, proceed to say: "We found that Colney Hatch Lane taken as a whole was sufficiently built upon to be a street before the Metropolis Management Act, 1855, came into operation, and we were of opinion that that portion of the lane which is in Clerkenwell could not be dealt with by itself for the purpose of determining whether it was a new street." The summonses were taken out, and the expenses had been apportioned under ss. 52 and 53 of the Metropolis Local Management Act, 1862, under which if drainage is done in a new street the expenses can be apportioned on the frontagers.

Speaking for myself, I should have been glad if I could have seen my way to adopt the contention of the appellants. I think there is a great deal to be said for the view that this portion of the lane was, so far as the county of London and Clerkenwell are concerned, substantially a new street, and, the sewer being put down in the new street, it ought to have fallen within the rule which was applied in *Pound* v. *Plumstead Board of Works*. (1) But in this case the justices have found as a fact, and their finding is binding upon us, that Colney Hatch Lane had become a street in 1855 or 1862 (the difference in the years is unimportant), but I think the street for this purpose must be taken to be the whole road. I think they must be taken to have found that the portion of the street which was in Clerkenwell is included within the road which had become a street at the date that was mentioned, and I do not think it is open to the appellants to argue that for the purpose of this section the part of the road so forming part of the then street can be regarded as having become a new street because building on the Clerkenwell side of it has been carried on very extensively

(1) L. R. 7 Q. B. 183.

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since the year 1862. The point taken on behalf of the respondents, that if the boundary had happened to run just upon the other side of the Hornsey side of the road, even though a new sewer had been put down before there had been a large amount of fresh building, it could not have been possible to divide the road, affords a strong argument for this view; but, whether that is a conclusive argument or not, I think that on the face of the finding of fact we must come to the conclusion that the justices were right in saying that they could not treat the particular portion of Colney Hatch Lane which is in the county of London as a new street for the purposes of s. 52 of the Act of 1862. For these reasons I think the appeal must be dismissed with costs.

KENNEDY J. I am of the same opinion. I think we fully appreciate the very able argument on behalf of the appellants, and the suggestion that practically this street may be treated, for the purpose of Clerkenwell, as a street of which one side is not the other side of the road physically, but is a line drawn at the boundary of the jurisdiction of Clerkenwell running longitudinally along the highway. But it appears to me that, in the absence of authority, to create one more artificiality in the understanding of the expressions "street" and "new street" is certainly not to be desired; and having regard to the finding of the justices, from which I see no reason to differ, for it follows what I may call the primary and natural sense of the terms "street" and "new street," and does not violate any interpretation of those terms as given by the Court in reference to kindred Acts of Parliament, I prefer to say that the view taken by the justices is right, that they are right in law, and that there is nothing to find fault with in their decision.

Appeal dismissed.

Solicitors for appellants: *Boulton, Sons & Sandeman.*
Solicitors for respondents: *Tatham & Hardy.*

W. J. B.

C. A.

1900

Dec. 12.

[IN THE COURT OF APPEAL.]

THE FARNHAM FLINT, GRAVEL AND SAND COMPANY, LIMITED, APPELLANTS; THE GUARDIANS OF THE POOR OF THE FARNHAM UNION, RESPONDENTS.

Poor-rate—Occupation—Land—Gravel Pits—Exhaustion of Subject-matter of Assessment—Value of Occupation when Rate made.

A company purchased of the owner of a bed of gravel the gravel in three separate plots of land, with the right to dig and remove it. A time was fixed in each case in which the gravel might be taken out, and the company were bound to level the ground and replace the top soil, and to give the owner possession at the date named. The company were assessed in one assessment in respect of their occupation of the three plots, and a rate was subsequently made on the basis of this assessment. When this rate was made the company were still in occupation of the three plots, and were at work on the gravel in one of them, but all the gravel in the other two plots had been taken out, and they were only used as storage ground for gravel dug by the company. On a case stated at quarter sessions:—

Held, that the company were rateable on the value, at the time of making the rate, of the land in their occupation, and that the annual value ought to be taken at the amount of rent or royalty at which the same could then be reasonably expected to be let to a tenant from year to year, regard being had to the value of the gravel in the unexhausted plot, added to the value of the exhausted plots for storage purposes.

APPEAL from a judgment of a Divisional Court on a case stated by a court of quarter sessions upon an appeal against a decision of special sessions confirming a rate, in which the appellants were rated as the occupiers of a gravel pit.

The appellants carry on business as gravel and sand merchants, and for the purposes of their business from time to time enter into agreements with the owners of land for the purchase of gravel therein. By such agreements full right of entry upon such land is given for the purpose of digging for and carrying the gravel away. The appellants, having dug and removed the gravel, level the ground from which the gravel has been taken, replace the top sod, and restore the land to the owner.

For some time prior to the making of the rate appealed

against, the appellants had been in the habit of entering into such agreements with the Rev. J. M. Ward in respect of portions of a certain field or inclosure of land belonging to him and known as Ward's pit, each plot of land containing gravel being the subject of a separate agreement. Upon an agreement being entered into for the sale to the appellants by J. M. Ward of the gravel under any plot of land, the extent of land to which such agreement related was marked out by stumps, and the exclusive occupation of so much of the land as was marked out was handed over to the appellants on signature of the agreement. The work of digging for gravel was then commenced by the appellants. The land from which the gravel was actually being extracted was constantly shifting as the work progressed, and when the gravel in any portion of the land was exhausted, that portion of the land would be used as a store for gravel not yet sold and removed. Upon the expiration of the period allowed by any agreement between the appellants and J. M. Ward, the portion of the land from which gravel had been dug was made level with the rest of the land, and the whole of the land comprised in the agreement was restored to J. M. Ward.

The appellant purchased gravel from J. M. Ward on the following dates and in the following quantities, namely, on May 14, 1897, one acre; on June 24, 1897, one acre and a half; on April 15, 1898, one acre; on November 14, 1898, one acre; and on March 21, 1899, one acre.

The agreements for the sale of the gravel were in writing, and a copy of the agreement, dated November 14, 1898, being the last agreement entered into before the making of the rate, was annexed to the case. The other agreements were similar in form, and the same sum was to be paid by the appellants thereunder, save that under the agreement dated June 24, 1897, the price paid was 150*l.* only, while the period of one year and a half was allowed for the extraction of the gravel.

On December 8, 1898, when the rate was made, the appellants were in rateable occupation of three and a half acres of land. In two and a half of the three and a half acres (being the lands referred to in the agreements of June 24, 1897, and April 15,

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1898) the gravel was exhausted, the gravel comprised in the agreement of June 24, 1897, having been exhausted in March, 1898, and the gravel comprised in the agreement of April 15, 1898, having been exhausted on September 1, 1898. The two and a half acres, however, continued to be in the occupation of the appellants, and were used by them for the purpose of storing gravel already dug. In the remaining one acre (being the land comprised in the agreement of November 14, 1898) the gravel was in process of being got.

The appellants were rated in respect of the land at 420*l.* gross estimated rental and 400*l.* rateable value.

The appellants contended that they were rateable in respect of the land in their occupation at the date of the rate appealed against. That the value of such occupation, so far as the unexhausted land was concerned, was to be ascertained from the consideration paid by the appellants for the occupation of such land under the agreement relating thereto in force at the date of the rate, including as part of such consideration the cost of making good the land occupied thereunder upon the expiration of the terms thereby created. That the value of such occupation, so far as the exhausted land was concerned, was to be ascertained upon the basis of what such land would let for as storing ground in connection with the other lands occupied by the appellants. That if the value of the appellants' occupation was not to be so ascertained, it was to be ascertained from the value of the gravel in the unexhausted land then in their occupation added to the values of so much of the exhausted land (then in their occupation) as was used by them for storage purposes.

The respondents contended that the proper way to ascertain the rateable value of the land was to ascertain the output of gravel dug during the year immediately preceding the making of the rate appealed against from so much of Ward's pit as had been in their occupation at any time during such year, and to assess the rateable value of the gravel pit at a sum based upon the total royalty which (having regard to the market value of gravel during the year in the neighbourhood) the appellants would have paid to the owners of the land, if instead of buying

the gravel they had agreed to dig and work the gravel on payment of a royalty on each yard of gravel dug, which method of payment was admittedly frequently adopted in the neighbourhood, and that this method of calculating the rateable value was correct in point of law.

Alternatively the respondents contended that the appellants were in occupation of more than two acres of land; that, having regard to the burden of the covenant to level the surface of the ground and replace the surface soil after removing the gravel (which work it was found would cost about 40*l.* an acre) the appellants had in effect paid or agreed to pay about 220*l.* per acre for the right to occupy the land for one year with liberty to dig the gravel therein; that the sum of 220*l.* was equivalent to an annual rent for the land paid by a tenant who had liberty to dig gravel therein; that the appellants as occupiers of the land must be rated at the full annual value thereof during the whole period of their occupation, although during part of that period a portion of the land was available only for the purpose of storing gravel; that the decision of the Queen's Bench in *Reg.* v. *Whaddon* (1) shewed that the appellants should be rated, during the whole of their occupation of the land under the written agreements, at the value thereof as enhanced by the right to dig gravel thereon; and that if the principle of valuation herein stated was correct in law, the assessmemt appealed against was supported in fact.

The quarter sessions held that the first contention of the respondents was wrong in law, but that if it were permissible to adopt the method of calculation therein set forth, the assessment appealed against would be correct. They further held that the second contention of the respondents was wrong in law, and that the annual value of the land in the appellants' occupation at the date of the making of the rate ought to be taken at the amount of rent or royalty at which the same could then be reasonably expected to be let to a tenant for one year, regard being had to the value of the gravel in the unexhausted acre of land added to the value of the exhausted two and a half acres of land for storage purposes, and on this principle

(1) (1875) L. R. 10 Q. B. 230.

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they found as a fact that the amount at which the land could reasonably be expected to be so let was 252*l.*, and they accordingly fixed the gross estimated rental of the lands at 252*l.*, and the rateable value thereof at 242*l.*, and allowed the appeal, and ordered the assessments of the appellants' land and the rate to be reduced accordingly.

The question for the opinion of the Court was whether or not the quarter sessions were right in their determination.

The agreement of November 14, 1898, contained the following provisions: "The vendor shall sell and the company shall purchase all that the gravel now in or upon all that piece of land as now measured and stumped out containing one acre . . . . at the price of 175*l.* . . . . the company shall remove the gravel from the said piece of land within one year from the date hereof, and shall at that time give up vacant possession of the land to the vendor, and any gravel not removed within the time aforesaid shall be the absolute property of the vendor. . . . . The company shall have full and free ingress, egress, and regress during such period as aforesaid on and over the said land . . . . and also full and free liberty during such period as aforesaid to dig, make, and use such pits in the said land as may be found necessary for the purpose of digging, getting, and removing the gravel; and also will duly and punctually pay all rates, taxes, and outgoings, parliamentary or otherwise, payable in respect of the said land, and the materials taken therefrom, and whether charged upon the landlord or tenant in respect of the same. The company shall at their own expense prior to the expiration of one year from the date hereof level the ground from which the gravel shall have been taken and replace the whole of the surface soil removed therefrom, and will so deliver up the same to the vendor."

The learned judges of the Queen's Bench Division, before whom the case came on appeal, were divided in opinion.

Channell J. was of opinion that the decision of the court of quarter sessions was wrong. He considered that *Reg.* v. *Whaddon* (1) was in point, and that any partial exhaustion by the occupier of the subject-matter of rating did not affect the

(1) L. R. 10 Q. B. 230.

rateable value so long as the special user continued, as otherwise the rateable value would vary from day to day, and that where property has to be rated in respect of a beneficial use which is being made of it, which use is destructive of the subject-matter, the rating authority should ascertain what amount of use the tenant has been making and continues to make of the property, and then ascertain what a tenant would give for liberty to make that amount of use of the property from year to year independently of the question whether there is or is not enough of the property remaining for the tenant to be able to go on making that use for a whole year. He also considered that the dictum of Blackburn J. in *Reg.* v. *Abney Park Cemetery* (1), that "the Legislature has taken as a basis the rent which a tenant from year to year would give during the year preceding the time of making the rate," was, if correct, conclusive of the present case.

Bucknill J. was of opinion that the principle of the decision of the court of quarter sessions was right; that *Reg.* v. *Whaddon* (2) was distinguishable, and that *Rex* v. *Bedworth* (3) was in point; that the dictum of Blackburn J. in *Reg.* v. *Abney Park Cemetery Co.* (1), which did not appear in other reports of the case, if correctly reported, was applicable only to exceptional cases; and that the company could only be assessed at the actual value of their occupation at the time of the making of the rate.

The appeal was dismissed.

The Farnham Union appealed.

Marshall, Q.C., and *Ryde*, for the Farnham Union. The decision of the special sessions was right. *Reg.* v. *Whaddon* (2) is in point. The only distinction between that case and the present one is that in the former the landlord undertook to let ten acres at a time in such a way that the occupation was continuous; but the judgments do not turn upon the fact that the occupier had a contract relating to his right to dig coprolites in the future. It cannot be that property such as a gravel pit

(1) (1873) L. R. 8 Q. B. 515, at p. 519. (2) L. R. 10 Q. B. 230.
(3) (1807) 8 East, 387; R. R. 476.

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must be inspected before each rate is made, and the proper course is either to rate the occupier on the rent that he pays or on an hypothetical royalty based on the amount of gravel extracted in the previous year: *Reg.* v. *Abney Park Cemetery Co.* (1) In *Rex* v. *Hull Dock Co.* (2) Lord Ellenborough said: "To hold that in every case where property is rateable, an account is to be taken, for the particular period for which the rate is imposed, of the precise amount of its productiveness, and that if there is the smallest decrease, the rate is to be reduced pro tanto, would, in my judgment, be infinitely inconvenient." In *Reg.* v. *Westbrook* (3) Lord Denman pointed out that the payment in respect of a brickfield was not the less a rent because the subject-matter of the rating was in course of being consumed. The words of the Parochial Assessment Act are inapplicable to this particular description of property, and, as said by Shee J. in *Great Eastern Railway* v. *Haughley* (4), some reasonable cy-près intendment must be given to them. The court of quarter sessions rightly treated the company's holdings as one hereditament, but, in ascertaining its rateable value, they applied different measures to different parts. If the gravel is worked uniformly over a year, then the gross annual value in the second half-year is the same as in the first and is determined by the rent. If because the gravel is exhausted in six months the land is to be rated at its storage value, then the entire rent is attributable to the first six months' working, and is the value for those six months, so that the annual value would be double the rent. To make the rateable value diminish as the working proceeds would give rise to serious descrepancies with regard to similar properties. If the view of the appellants is taken, and if it is assumed that 200*l.* worth of gravel can be worked out in half a year, and that a rate is made just after the taking of the land, the occupier of that holding would pay nothing as storage value to a rate made after the gravel was exhausted, but a man with a holding worth 400*l.* would pay three times as much as the other instead of twice as much, for he would pay on the 400*l.* to the first rate, and on half that

(1) L. R. 8 Q. B. 515.
(2) (1816) 5 M. & S. 394.
(3) (1847) 10 Q. B. 178.
(4) (1866) L. R. 1 Q. B. 666, at p. 685.

amount to the second, or on 600*l.* in all. Considering the desirability of uniformity of rating, a mode of arriving at the rateable value which produces this result cannot be right.

R. Cunningham Glen, for the company. There is nothing to prevent an occupier from rendering his land of less assessable value: *East London Railway* v. *Whitechurch* (1), and it cannot make any difference whether the diminution in value arises from the act of the occupier in working out gravel or minerals or from something not his act, as in the case of a house being burned. No argument can be founded on the assessment being a yearly one, for under the Statute of Elizabeth rates may be made as and when they are necessary. It is clear that the basis of a rate is the value of the hereditament at the time when the rate is made: *Staley* v. *Castleton Overseers.* (2) Whenever it is practicable to do so, the test to be applied is not what has been done in the past, but what would be given in the future: *Hoyle* v. *Oldham Union.* (3) It is only in exceptional cases such as *Cartwright* v. *Sculcoates Union* (4) that recourse should be had to other methods of arriving at rateable value. An hypothetical tenant would not give as much for land useful only for storage purposes as he would for land containing gravel which he could get out, and what he would give is the only test that should be applied. In *Reg.* v. *Abney Park Cemetery Co.* (5) there was no question as to what would have been the rateable value had there been no more space left than would be filled in six months. It was assumed that there would be beneficial occupation for the whole of the next year, so that the case has no bearing on the present one.

Marshall, Q.C., in reply.

A. L. SMITH M.R. This is an appeal from a judgment of the Queen's Bench Division in which the learned judges differed, Bucknill J. upholding the quarter sessions, and Channell J. reversing them. I propose to adhere to the questions raised in the special case, for I think we have no

(1) (1874) L. R. 7 H. L. 81.
(2) (1864) 5 B. & S. 505; 33 L. J. (M.C.) 178.
(3) [1894] 2 Q. B. 372.
(4) [1899] 1 Q. B. 667; [1900] A. C. 150.
(5) L. R. 8 Q. B. 515.

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jurisdiction to go outside those questions, as, with deference to the learned judges in the Court below, I think they have.

The appellants, the Flint Company, took from the owner of a tract of land with gravel in it some three acres, with the right to win the gravel therefrom, and the question is how they are to be rated. There is no shadow of doubt as to the general rule that what is to be found out, when ascertaining rateable value, is what an hypothetical tenant would give for the occupation of the land as tenant from year to year, subject to certain deductions and charges that are to be found in the Parochial Assessment Act. In the present case what the special sessions had to ascertain was, what would be given for the land with the right to exhaust the gravel to be found there. The rule is stated in plain terms by Lord Esher in *Hoyle* v. *Oldham Union* (1)—that what the assessment committee had to do was to assess the occupiers "for the coming year, and they had to say what at that moment in their judgment an hypothetical tenant from year to year would give as rent for those premises, after making allowance for the parliamentary deductions." Before the gravel was worked an assessment was made on the appellants, and, as time went on, a rate was made on them in respect of their occupation. By that time part of their holding had been exhausted and had no gravel left in it. The special sessions decided that the rate nevertheless must be on the old assessment. Now is it true to say that an hypothetical tenant from year to year would give as much for the occupation of this land with half the gravel exhausted as he would give for the land with all the gravel in it? It seems to me that it might just as well be argued that he would give the same rent if all the gravel had been exhausted. The company objected to being rated on the old assessment as only part of the land had gravel left in it. It is admitted that if a house is burned down the person to be rated may say that he was formerly the occupier of a house and land, but that his position had been altered, and that he had become the occupier of land only, without a house, and so get the rate reduced. That is not controverted; but it is said that the company cannot take

(1) [1894] 2 Q. B. 372.

the point because they have themselves taken away the gravel. To my mind it does not matter whether the occupier had taken away that which made the occupation profitable or whether it has disappeared in some other way. The fact remains that the occupation has become so much the less profitable, and that an hypothetical tenant from year to year would give so much the less rent than he would have given at the time of the assessment.

My brother Collins will deal with the cases, and I do not propose to say more than that, if the dictum attributed to Lord Blackburn in *Reg.* v. *Abney Park Cemetery Co.* (1)—that in estimating rateable value the general rule was to consider what a tenant from year to year would give during the year preceding the time of making the rate—was really uttered, I cannot agree with it. Lord Ellenborough's decision in *Rex* v. *Bedworth* (2) is sufficient to cover this case. The test is not what the value was in the preceding year, but what a tenant would give in the coming year, and the amount that the tenant has worked out in the previous year is not the basis on which to arrive at the rent that would be paid for the coming year. I think the question put to us must be answered by saying that the special sessions were wrong, and that the principle on which the court of quarter sessions decided was right, and, if so, the figures they arrived at must be accepted. The appeal should therefore be dismissed.

COLLINS L.J. I am of the same opinion. The standard to be applied must be that laid down in the Parochial Assessment Act, by which the net annual value of a hereditament rated to the relief of the poor is "the rent at which the same might be reasonably expected to let from year to year" after deducting certain expenses. That in its terms points to an estimate, and one of future value, not to a statement of something already ascertained in the past. The case before us by the statement of facts eliminates one of the conditions in *Reg.* v. *Whaddon* (3), because here we have to deal with a fixed amount

(1) L. R. 8 Q. B. 515, at p. 519. (2) 8 East, 387; 9 R. R. 476.
(3) L. R. 10 Q. B. 230.

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of land without any agreement as to a possible accretion. The main point of difference between my brother Channell and the court of quarter sessions is whether the annual value is to be ascertained by reference to what was paid in the year preceding the date when the rate was made, or by reference to what may be reasonably expected to be obtained in the following year. But for the judgment of the learned judge and the quotations from judgments of Blackburn J., I should have thought the matter clear, because the only cases in which recourse can be had to actual profits or earnings in the past are those in which the ordinary methods fail. In such cases antecedent profits can be used as a stepping stone to arrive at a conclusion as to the future. Channell J. relied mainly on *Reg.* v. *Whaddon.* (1) In my opinion there are two cardinal distinctions between that case and the present. There an initial difficulty existed which the Court had to get over, that the person rated had a shifting occupation amounting at all times of the year to ten acres, though they were not always the same ten acres. That was got over by treating the occupation as an occupation of ten acres, though it might not be possible to define the exact ten acres. There was exhaustion at one end of the land occupied and accretion at the other, so that the tenant had always had in view the right to occupy ten acres at a time. When considering what amount an hypothetical tenant would give, it was kept in view that he would have the right to get out as much as he could, though he could not work more than ten acres at a time. Here it would not be justifiable to take into consideration any expectation of acquiring any further holding. The court of quarter sessions held that "the annual value of the land in the appellants' occupation ought to be taken at the amount of rent or royalty at which the same could then"—that is, at the time of the making of the rate—"be reasonably expected to be let to a tenant for one year, regard being had to the value of the gravel on the unexhausted acre of land added to the value of the exhausted two and a half acres of land for storage purposes." The only exception I have to take to that is to the expression "one year," the standard established by the Act

(1) L. R. 10 Q. B. 230.

being a tenancy from year to year. This, however, is not material in the case before us, in which the matter is akin rather to a purchase of the gravel by instalments than to a tenancy from year to year, though in such a case it is well settled that what a tenant pays is to be regarded as rent. Subject to this remark, the court of quarter sessions clearly laid down a right principle, and their conclusions of fact on that principle are final. Channell J. bases his judgment on the view that the standard to be taken is what was the amount that a tenant from year to year would have given during the antecedent year. He lays that down in express terms when dealing with the case of *Reg.* v. *Abney Park Cemetery Co.* (1), and he quotes Blackburn J. in support of his view. The quotations taken from the report of that case in the LAW REPORTS are these: "The Legislature has taken as a basis the rent which a tenant from year to year would give during the year preceding the time of making the rate," and "no injustice will be done if the company are rated in every year according to the value which an hypothetical tenant would give for the occupation in the preceding year, and according to this rule the company's receipts in one year will govern the rateable value of the cemetery in the next." Channell J. adds: "Of course it may be said that the principle of taking the value in the past year was only applied in the cemetery case because there was no reason why the receipts from burials in the next year should not be as large as in the preceding year. But would not the same rule be applied in the last year before the cemetery became full; that is, when it was not quite full, but when it was known that it would be full before the next year was ended? I think it would. . . . It would not be rated at half the annual value in the last year, because there was only room for six months' burials, any more than a man would be rated at half the annual value of his house because he had only six months' term remaining of his lease." That is the keynote of his judgment; but it seems to me that there are two errors. So far as the learned judge relies on the dicta of Blackburn J., I do not think that the authorities bear them out; and, secondly,

(1) L. R. 8 Q. B. 515.

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with the very greatest respect for my brother Channell, I think there is a confusion between the duration of a tenancy and the duration of the thing occupied.

As to the authorities, I do not think that Blackburn J. can be taken to have decided that as a general rule the preceding year is to be looked at. The passages quoted are not to be found in the other reports of the case (1), and are inconsistent with a long series of cases, and were not necessary for the decision of the case in which they occur. Another dictum of Blackburn J. in the *Law Journal* report of *Staley* v. *Castleton Overseers* (2) was referred to in argument. The learned judge is reported to have stated that the decision of Lord Ellenborough in *Rex* v. *Bedworth* (3) was not law. That, however, I am told, is not to be found in the contemporaneous reports of the case. (4) The material passage in *Rex* v. *Bedworth* (3) to which the remark attributed to Blackburn J. applies is: "Here the mine itself is exhausted, the subject-matter of profit is gone, although the rent, which was no doubt calculated upon the probable average produce during the whole term, be still payable. . . . But with respect to the parish, he is only rateable for the concurrent annual value during the period for which the rate is made; and when the thing which he occupies no longer affords any such concurrent value, the subject-matter of the rating is gone." If this is true as to the whole subject-matter which is to be rated, it is equally true as to part. I find in *Reg.* v. *Westbrook* (5), decided in the year 1847, long after the decision of Lord Ellenborough in *Rex* v. *Bedworth* (3), which was cited in the case, that Lord Denman, in giving the judgment of the Court, said: "It does not appear to us that the circumstance of a more or less rapid consumption can make any difference in the principle. The rate is always imposed with reference to the existing value; whether temporary or enduring is immaterial." He puts the case of a brickfield exhausted in less than a year, and says: "It would be only

(1) 42 L. J. (M.C.) 124; 29 L. T. 174; 21 W. R. 847; 37 J. P. 822.
(2) 33 L. J. (M.C.) 178.
(3) 8 East, 387; 9 R. R. 476.
(4) 5 B. & S. 505; 10 L. T. 606; 12 W. R. 911; 28 J. P. 710; but see 10 Jur. (N.S.) 1147, at p. 1149.
(5) 10 Q. B. 178.

reasonable that it should bear an increased rate for that year: in the following year its value might sink almost to nothing, and the rate ought to fall proportionately, even to nothing, if, the brick earth being exhausted, the land, like an exhausted coal mine, should become entirely unproductive." That has reference to a brickfield, but it obviously founded on Lord Ellenborough's decision as to a coal mine. Lord Denman's decision is exactly in point in the present case, and it also goes to shew that Blackburn J. could not have laid down the proposition attributed to him. On these grounds I think the decision of the court of quarter sessions and the judgment of my brother Bucknill upholding it were right.

STIRLING L.J. I agree.

Appeal dismissed.

Solicitors for appellants: *E. A. Jackson, Farnham.*

Solicitors for respondents: *Johnson, Weatherall & Sturt, for Potter & Crundwell, Farnham.*

A. M.

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Nov. 26.

Revenue—Estate Duty—Policy of Life Insurance—Settled Property—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 3.

By s. 1 of the Finance Act, 1894, estate duty is granted upon all property which passes on the death of a person dying after the commencement of the Act. By s. 2, "property passing on the death" is to be deemed to include (sub-s. 1 (*d*)) any annuity or other interest purchased or provided by the deceased to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death. Sect. 3 exempts from estate duty property passing on the death of the deceased by reason only of a bonâ fide purchase from the person under whose disposition the property passes, where such purchase was made for full consideration in money or money's worth paid to the vendor for his own use or benefit.

A tenant for life of freehold estates, being in pecuniary difficulties, entered into an arrangement with his son, the tenant in tail in remainder, by which the entail was barred, and the fee was then mortgaged to secure advances to the father. The father was also possessed of policies on his own life to an amount substantially equivalent to the amount of the mortgage debt, which policies were, pursuant to the arrangement, assigned to

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trustees, who were to receive all policy moneys (if any) that might become payable during the life of the father and apply them in reduction of the mortgage debt, and subject thereto were to hold all policy moneys and accumulations in trust for the son. The father's life interest was assigned to the trustees, who were out of the income to pay the mortgage interest and the premiums on the policies and other specified outgoings, and to divide the surplus income up to a certain amount between father and son and create a sinking fund out of the ultimate surplus. On the father's death the trustees received the policy moneys and paid them over to the son:—

Held, that the sums payable under the policies were an "interest purchased or provided by the deceased" within the meaning of s. 2, sub-s. 1 (*d*); that the arrangement did not amount to an assignment of the policies to the son, but was an arrangement by virtue of which an interest in the policies passed to the son on the father's death; that the transaction was in the nature of a family arrangement and not a purchase by the son, and that therefore the exemption from estate duty contained in s. 3 did not apply.

INFORMATION by the Attorney-General claiming estate duty upon the death of Henry Ashhurst Hawkins on the principal value of moneys received in respect of certain policies of assurance upon his life. The information set out at considerable length the various recitals and covenants in a deed of family arrangement dated July 13, 1897, of which the following is substantially the effect.

By three indentures of settlement, bearing date December 31, 1866, January 23, 1867, and November 1, 1893, which were referred to as the principal indentures, the deceased, Henry Ashhurst Hawkins, was at the date of the family arrangement tenant for life of certain hereditaments and premises subject to the incumbrances specified in the first schedule to the deed of family arrangement, and his son, the defendant, was tenant in tail in remainder of the estates; the deceased was also entitled to certain policies of insurance on his own life for sums amounting in the whole to 69,500*l*., subject to such of the incumbrances above mentioned as affected them. The deceased being in financial difficulties, a family arrangement was come to between the deceased and the defendant, of which the principal terms were, (1.) that the estate tail of the defendant should be barred, and the estates should be limited to such uses and trusts as the deceased and the defendant should jointly appoint, with

remainder to the deceased for life, with remainder to the defendant in fee, the defendant to have power to appoint at any time to himself the sum of 2000*l.* to his own use; (2.) that the incumbrances upon the life interest of the deceased specified in the first schedule and certain sums of money specified in the second schedule should be paid off, the money required being raised as to 70,000*l.* by a mortgage in fee of the freehold hereditaments subject to the uses and trusts of the three principal indentures, and as to the balance by sale of a sufficient part of the investments standing in the names of the trustees of the indenture of December 31, 1866; (3.) that the policies should be assigned to trustees upon certain specified trusts; (4.) that the deceased should during his life keep down the mortgage interest and pay the premiums and other sums of money necessary for keeping the policies on foot; (5.) that a receiver of the income of the real estate during the deceased's life should be appointed, and (6.) that the deceased's life interest should be assigned to trustees.

In pursuance of this arrangement a disentailing deed was executed on June 24, 1897, and by an indenture of mortgage of July 12, 1897, to which both father and son were parties, the real estate was mortgaged for a sum of 70,000*l.* By a deed of June 25, 1897, certain investments and moneys were appointed to be held on trust to raise thereout such sums of money as with the 70,000*l.* should be sufficient to discharge the incumbrances and other specified debts and the costs of the family arrangement. By an indenture of July 12, 1897, the deceased assigned the policies of assurance to the trustees of the deed of family arrangement, which was executed on the following day. By the deed of family arrangement, after reciting that the incumbrances in the first schedule had been paid off and that the sums in the second schedule were to be paid off forthwith, the deceased covenanted to pay the interest on the 70,000*l.* during his life, and it was declared that the trustees should receive all the moneys (if any) which should during the life of the deceased become payable under any of the policies (some of which were terminable policies) and apply them towards the discharge of the mortgage debt, and subject thereto the trustees

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were to hold the policy moneys and accumulations in trust for the defendant, the deceased covenanting to pay the premiums during his life. By the same deed the deceased conveyed his life estate under the three principal indentures and the disentailing deed to the trustees upon trust to pay out of the income the mortgage interest, the premiums on the policies, premiums of fire insurance, and other necessary expenses, and to pay two-thirds of the surplus income to the deceased and one-third to the defendant, with a proviso that any surplus income over 3000*l.* should be used for creating a fund for payment of succession duties.

The first schedule to the deed of July 13, 1897, contained particulars of the incumbrances on the life estate of the deceased; the second, particulars of certain sums amounting to about 3000*l.*, payment of which had to be provided for; and the third, particulars of the policies on the deceased's life for sums amounting (exclusive of bonuses) to 69,500*l.*

All the policies were effected by the deceased and all premiums were paid by him during his life. The policies belonged at the date of the indenture of July 12, 1897, to the deceased absolutely, subject only to the agreement carried into effect by him by the deed of family arrangement.

The deceased died on May 10, 1898. No moneys became payable under any of the policies during his life. After his death the trustees of the deed of family arrangement received all the moneys (including bonuses) payable under the policies, and paid or accounted for them to the defendant.

Under these circumstances the Crown claimed that estate duty had become payable under s. 2, sub-s. 1 (*d*), or under the other provisions of ss. 1 and 2 of the Finance Act, 1894, in respect of the moneys received under the policies as property passing on the death of Henry Ashhurst Hawkins, the deceased, and the informant prayed for a declaration that upon his death estate duty became payable upon the principal value of all such moneys. (1)

(1) The Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1: "In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid,

The Attorney-General (*Sir R. B. Finlay, Q.C.*), *The Solicitor-General* (*Sir E. H. Carson, Q.C.*), and *Vaughan Hawkins*, for the Crown. The effect of the resettlement of July 13, 1897, after the mortgage of the previous day, was that the settled property which passed to the defendant on his father's death was only the equity of redemption: *Earl Cowley* v. *Inland Revenue Commissioners* (1); the 70,000*l.* was taken out of the settlement, and the Crown was entitled to estate duty upon the equity of redemption only and not upon the whole property. But the result of the way in which the policies of insurance were dealt with was in effect to settle the policies instead of

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upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'estate duty,' at the graduated rates hereinafter mentioned, and the existing duties mentioned in the first schedule to this Act shall not be levied in respect of property chargeable with such estate duty."

Sect. 2: "(1.) Property passing on the death of the deceased shall be deemed to include the property following, that is to say . . . .

"(*c*) Property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom; and

"(*d*) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

Sect. 3: "(1.) Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a bonâ fide purchase from the person under whose disposition the property passes, nor in respect of the falling into possession of the reversion on any lease for lives, nor in respect of the determination of any annuity for lives, where such purchase was made, or such lease or annuity granted, for full consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee.

"(2.) Where any such purchase was made, or lease or annuity granted, for partial consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee, the value of the consideration shall be allowed as a deduction from the value of the property for the purpose of estate duty."

(1) [1899] A. C. 198.

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the 70,000*l.* taken out of the settlement, so that the defendant succeeded to the family estates diminished by 70,000*l.*, the amount of the mortgage, but increased by 69,500*l.*, the amount of the policies; there was a mere substitution of one estate for another. The circumstances shew that this was a family arrangement and not a sale for valuable consideration. The distinction between a sale and a family arrangement is well pointed out in *Brown* v. *Attorney-General* (1), a case under the Succession Duty Act; the present is indeed a stronger case, for in *Brown* v. *Attorney-General* (1) the arrangement as to the partnership between father and son was primâ facie a commercial one, which the arrangement in the present case was not. The effect of ss. 1, 2, and 3 of the Finance Act, 1894, is that, where a man makes a policy of insurance on his own life, the policy is part of his estate at his death; but if it is disposed of in his lifetime, then the person to whom it comes at his death must pay estate duty upon it, unless he acquired it by purchase. There was a disposition of these policies in the lifetime of the deceased by their being assigned to trustees and settled in substitution for other property taken out of settlement, and they cannot be brought within the exemption from duty in s. 3 of the Finance Act, 1894. The case is concluded by the decision in *Attorney-General* v. *Dobree* (2), which is entirely in point, the only difference being that in that case the question arose upon a marriage settlement instead of upon a deed of family arrangement.

Haldane, *Q.C.*, and *Hole Bethell*, for the defendant. The fact that property is dealt with by a family arrangement does not exclude from consideration the fact that it is transferred for money or money's worth; that is the effect of the decision in *Lord Advocate* v. *Earl of Fife* (3), and the question is what is the nature of the transaction in the present case. The case is very different from *Brown* v. *Attorney-General* (1), which was a decision upon the facts that there had not been a sale, and which merely shews that a deed, which is on the face of it a partnership deed, may also be a deed of family arrange-

(1) (1898) 79 L. T. 572. (2) [1900] 1 Q. B. 442.
(3) (1883) 11 R. 222.

ment. What was done in the present case was not to take one estate out of settlement and to put in another in substitution for it; there was in effect a transaction under which for money or for money's worth the defendant has acquired the absolute property in these policies. The real question is whether the policies were acquired for money or money's worth, and having regard not only to the documents themselves, but also to the surrounding circumstances, especially to the facts that the deceased was in financial difficulties and was on bad terms with the defendant, the transaction clearly amounted to a sale, and falls within the exemption in s. 3 of the Finance Act, 1894. Under the Succession Duty Act it was held in the analogous case of *Fryer* v. *Morland* (1), that a conveyance or assignment by way of bonâ fide sale does not create a succession; and *Lord Advocate* v. *Earl of Fife* (2), which is a natural sequel of that decision, applied the same doctrine to the case of family arrangements. Here the defendant has allowed the creation of a debt upon the inheritance in consideration of his getting the policies, and that brings the case within the exemption. *Attorney-General* v. *Dobree* (3) is not in point, for in that case the consideration was marriage and not money or money's worth.

The Attorney-General was not called upon to reply.

KENNEDY J. I am clearly of opinion that our judgment must be for the Crown. It is unnecessary to recapitulate the facts set out in detail in the information; I accept them as correct, and I also accept as a fact the statement made during the argument (which was indeed admitted by the Attorney-General) that the defendant and his father at the time when the transaction was entered into were at arm's length, and that the father was in bad health. Shortly, the position was this: the condition of the property, and the relations between the defendant and his father, were such that the defendant was entitled to deal with it. The father was in difficulties, in fact insolvent, and the defendant was doubtless desirous of

(1) (1876) 3 Ch. D. 675.
(2) 11 R. 222.
(3) [1900] 1 Q. B. 442.

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getting some income for himself, and was acting for his own interest. Between the two an arrangement was come to, which, as regards the matter in dispute, involved practically (though I may not be using the most artistic words) the inclusion in a settlement of the moneys arising from policies of insurance upon the father's life, I will not say in substitution for, but coincidently with, the disappearance from the settlement of the mortgaged property; the intention and the effect of the arrangement being that for the interest (whatever it might be) that would otherwise have passed to the son there was practically a substitution of an interest in these policies of insurance. It seems to me that under these circumstances it is impossible to say that these policies do not come under s. 2 (*d*) of the Finance Act, 1894, and to hold that estate duty is not payable upon these moneys.

The contention on behalf of the defendant is this: that, whatever might have been the effect of s. 2, sub-s. 1 (*d*), upon the passing of these policies, had there been no such provisions as those enacted in s. 3, sub-ss. 1, 2, we ought to hold that in the present case there is no liability to estate duty, because of the provisions of s. 3, sub-ss. 1, 2, that we ought to say that there has been a bonâ fide purchase from the deceased by the defendant for a consideration in money or money's worth, and that there has been not a succession, or what is equivalent to a succession, but merely a purchase, the performance of which was not to be completed until the death of the deceased. It seems to me that this is not the true relation of the facts, but that there was (whether it is called a settlement, or a family arrangement, or by any other name) that which for the purposes of this Act and in the terms of this Act was an "interest purchased or provided by the deceased," and which is taxable "to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased." The arrangement was not an assignment of the policies to the son; it was an arrangement by which an interest passed to the son in those policies under the terms of the settlement upon the death of his father—that is to say, a succession—a valuable interest which accrued to him in consequence of his surviving

his father. On that ground, and on that ground alone, it seems to me that this case may be distinguished from the case of *Lord Advocate* v. *Earl of Fife*. (1) In that case it was found that there was an actual assignment to the son of the policies which were the subject of the decision; the son took them over as part of the bargain by which the father was relieved of considerable difficulty; in other words, the son became assignee of the policies, and although he could not at the time actually realize them he would have had the right (as my brother Phillimore has pointed out) to deal with them by way of surrender as he pleased. That is not the case here. This is really an arrangement by which the defendant in effect, because he was the survivor, got an interest in the proceeds of the policies on his father's death.

The case of *Brown* v. *Attorney-General* (2) seems to throw, so far as a case which was no doubt determined upon its special facts can do so, some light upon the principle by which these cases ought to be decided. For example, is the transaction in substance a purchase or is it an arrangement—a settlement by which a benefit passed on the death of the father? We cannot apply the case itself, for the circumstances are different, but, taking loyally the view of the House of Lords, it seems to me that the present is an a fortiori case, for there is here really no attempt at a purchase, but merely a benefit, no doubt by way of compensation for a benefit on the other side, but still nothing equivalent to a bargain and sale. The case of *Attorney-General* v. *Dobree* (3) has also been cited to us, and I agree with the defendant's counsel for the reason he gave, that it is not a binding authority upon us in the present case. There was unquestionably in that case an element which is not present here: there was the fact that the only original consideration was the consideration of marriage. That is, I think, a sufficient distinction, and I do not think that the case can be treated as an authority upon the operation of s. 3 in its application to the present case. At the same time, I would observe that Channell J. in a very full judgment pointed out

(1) 11 R. 222. (2) 79 L. T. 572.

(3) [1900] 1 Q. B. 442.

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that the case raised two separate questions. The first point decided was whether or not the case of a policy of insurance falls within s. 2, sub-s. 1 (*c*) and (*d*), and to that extent his view is our view. But the other point, upon which the decision really rests, was that the exemption from duty in s. 3 did not apply. It is not a decision which covers the present case, because if there is here any consideration it is not a question of marriage, but a question of the benefits which the defendant was giving to his father by concurring in the acts which cut off the entail and made these other arrangements possible; it is in a sense to be treated as a bargain and consideration, although not to my mind a transaction of purchase at all. There is a bargain; there is an arrangement; the arrangement is, as I have already said, in one form a settlement, in another a family arrangement, for the benefit it may be of both parties, but not constituting a purchase within s. 3. I think, therefore, that our judgment must be for the Crown.

PHILLIMORE J. I am of the same opinion. Shortly before July 13, 1897, considerable landed estates appear to have been vested in one Henry Ashhurst Hawkins for life, remainder to his successor in tail male, and considerable personal property seems to have been held upon corresponding trusts. That gentleman was in considerable difficulty; he had borrowed something like 70,000*l.* upon mortgage of his life interest, and he had effected policies to very nearly the same amount on his life. Besides that, he had a considerable debt unsecured, for which I suppose he could not give any security. The son, the present defendant, was also in difficulty. He was dependent upon his father's bounty and could get nothing from his father, and under an order of Kekewich J. he had borrowed money and charged his reversion for the expenses of his education. Under those circumstances a transaction was effected by two deeds. First of all, the estate was disentailed in the ordinary way and, subject to a joint power of appointment, was settled upon the father for life, remainder to defendant in fee. Secondly, the defendant joined in a mortgage and enabled his father to transfer the mortgages from his

life estate and conveyed them into a mortgage on the land; in other words, he joined with his father in mortgaging the fee simple of the property for 70,000*l.* He also enabled his father to get the trustees (in other words, he concurred in asking the trustees) to assign 16,000*l.* of the settled personalty generally for the benefit of his father. In return he got a sum of possibly 2000*l.* himself, he got provision made for the payment of his debt that otherwise would have been a reversionary charge, he got an income for himself during his father's life of 1000*l.* a year; the settlement of these matters may be taken to balance the 16,000. To balance the incumbrance created on the fee of 70,000*l.* the father brought into settlement the policies on his life, which were worth very nearly the same amount; in other words, the 70,000*l.* was taken out of the settlement in the form of a mortgage on the land, 69,500*l.* was brought into the settlement in the form of policies, and as far as the defendant was concerned the benefit with the burden would accrue to him. It is quite true that the land was charged at once, and that the policies would not come in until his father's death or the expiration of the period, some of them being terminable policies, when the term for which they were granted would expire; but, on the other hand, the defendant had no interest in the property except his allowance until his father's death, and on his father's death he would succeed to the property less by 70,000*l.* and more by 69,500*l.*

Now, the House of Lords have, if I may say so respectfully, given effect to common sense by their decision in *Earl Cowley* v. *Inland Revenue Commissioners*. (1) The son does not pay duty on the whole estate of the property, but only on his beneficial interest in the estate of the landed property. On the other hand, why is he not to pay duty on the other property which is brought in in substitution? It seems to me that the mere statement of the facts is enough to shew that our judgment in this case must be for the Crown. I can conceive that an arrangement might have been made by which this case would have become like that of *Lord Advocate* v. *Earl of Fife* (2), a decision with which I respectfully agree. If the arrangement

(1) [1899] A. C. 198. (2) 11 R. 222.

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had been that the defendant was to have these policies out and out, if he could have surrendered them at his pleasure, if he could have taken the bonuses, if in fact the policies had not been brought into settlement, but had been assigned to the defendant, then the case would have been like *Lord Advocate* v. *Earl of Fife*. (1) But they are not the defendant's policies; they are brought into settlement, and express directions are given in case bonuses are received or in case the terminable policies become realized. The money is then to be applied in relief of the settled estates, and not to go to the defendant. I think it is conceivable that if the father had lived long enough there might have been some balance on the policies which might have come to the defendant. If the father had lived over the ten years and the terminable policies had been paid in full, it might have been that the surrender value of the other policies with their bonus would have come to more altogether than 70,000*l*. In that case the defendant would have been in the position of being able to insist upon the surrender of all the other policies. If the policies would have realized 72,000*l*., that amount would more than have paid off the mortgage of 70,000*l*., and he might have insisted then upon having the balance given to him, and I think in that case, even possibly if he had not insisted during his father's life, he would not have had to pay estate duty upon that balance. But those events did not happen, and in the result the defendant found the estate diminished on the one side and added to on the other, and he is asked to pay on the value so arrived at. One word more: the decision of the Court of Session upon the facts (which, if I may say so, seems perfectly right) brings the case of *Lord Advocate* v. *Earl of Fife* (1) into line with *Fryer* v. *Morland*. (2) Here there was no purchase at all. It is not necessary to consider who really got the greater benefit; I should think that both parties got great benefits in this case from the arrangement, but at any rate the defendant did not purchase; he simply acquired the right to have something brought into the settlement, and allowed something else to be taken out. I say nothing about the case of *Attorney-General* v.

(1) 11 R. 222.

(2) 3 Ch. D. 675.

Dobree (1), which seems to have no bearing upon the present case; therefore I pronounce no opinion upon it.

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Judgment for the Crown.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendant: *Langlois & Co.*

W. J. B.

IN THE MATTER OF THE DUTY ON THE ESTATE OF COLONEL G. A. VERNON.

1900
Nov. 26, 27.

Revenue — Estate Duty — Interest in Expectancy — Incumbrances created by Reversioner—Deductions—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 21, *sub-s.* 3.

By the Finance Act, 1894, s. 21, sub-s. 3, "Where an interest in expectancy in any property has, before the commencement of this part of this Act, been bonâ fide sold or mortgaged for full consideration in money or money's worth, then no other duty on such property shall be payable by the purchaser or mortgagee when the interest falls into possession, than would have been payable if this Act had not passed; and in the case of a mortgage, any higher duty payable by the mortgagor shall rank as a charge subsequent to that of the mortgagee."

A tenant in tail in remainder to freehold estates raised money during the lifetime of the tenant for life (*a*) by granting annuities or rent-charges charged upon the property, (*b*) by purchasing an annuity and charging his interest in expectancy with the capitalized value, and (*c*) by a mortgage of his interest in expectancy:—

Held, that the annuities granted by the reversioner were in the nature of mortgages and not of sales for a valuable consideration; that the exemption in s. 21, sub-s. 3, of the Finance Act, 1894, was an exemption in favour of a purchaser or mortgagee, and not of a vendor or mortgagor, and that the reversioner was not entitled under s. 21, sub-s. 3, on the death of the tenant for life to exemption from estate duty in respect of any of the incumbrances created by him.

PETITION on appeal from the Commissioners of Inland Revenue under s. 10, sub-s. 1, of the Finance Act, 1894. The petition was substantially as follows:—

1. Leveson Vernon, of Stoke Park, in the county of

(1) [1900] 1 Q. B. 442.

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Northampton, duly made and executed his will in 1826, and it was proved in 1832.

2. Sir Henry Frederick Cooke duly made and executed his will in 1834, and it was proved in 1837.

3. From September 27, 1889, to November 25, 1896, Colonel G. A. Vernon was the tenant for life of the properties comprised in the wills, and the petitioner was the owner of the whole interest in expectancy in the properties.

4. (*a*) By an indenture of October 15, 1877, between the petitioner of the one part and John Pike and Alexander Howden of the other part, the petitioner sold and granted to Pike and Howden an annuity or clear yearly rent-charge of 684*l.* charged upon and to issue out of the property comprised in the wills and in the accounts subsequently mentioned, with power to the purchasers to enforce payment of such annuity or yearly rent-charge by entry, distress, and sale.

(*b*) By an indenture of June 3, 1880, between the same parties, the petitioner sold and granted an annuity or clear yearly rent-charge of 568*l.*, charged upon and to issue out of the property in like manner and with the like powers.

(*c*) By an indenture of October 21, 1887, made between the petitioner of the one part, and the National Life Assurance Society of the other part in consideration of an annuity of 800*l.* to be paid to the petitioner during the joint lives of himself and the survivor of William Frederick Vernon, the first life tenant of the properties comprised in the wills, and G. A. Vernon, the petitioner charged and secured on his interest in expectancy in the properties a sum of 10,555*l.*, to be paid upon the death without issue of W. F. Vernon or G. A. Vernon, whichever event should last happen.

(*d*) By indentures of October 30, 1890, and May 9, 1892, made between the petitioner of the first part, Caroline Eliza Vernon of the second part, and the National Life Assurance Society of the third part, the petitioner mortgaged his interest in expectancy in the properties for sums of 52,600*l.* and 3000*l.* respectively.

5. Since the death of Colonel G. A. Vernon on November 26, 1896, the trustees of the will, as to part of the property com-

prised therein, and as to the remainder the petitioner, as the person to whom the properties comprised in the wills passed and as accountable for the estate duty, delivered to the Commissioners of Inland Revenue accounts and affidavits in respect thereof; and the aggregate value of the properties was shewn and accepted by the Commissioners at 86,069*l.* 0*s.* 8*d.* From that sum, for the purpose of assessing the principal value of the property passing on the death of G. A. Vernon within the meaning of the Act and upon which estate duty was payable by the petitioner, the petitioner claimed to deduct the following sums:—

1. 8827*l.*, the agreed capitalized value of the annuity or clear yearly rent-charge referred to in paragraph 4 (*a*).

2. 7023*l.*, the agreed capitalized value of the annuity or clear yearly rent-charge referred to in paragraph 4 (*b*).

3. The sums of 10,555*l.* and 55,600*l.*, the amounts secured by the mortgages referred to in paragraph 4 (*c*) and (*d*).

The Commissioners having disallowed the deductions and the claim of the petitioner that in the circumstances the principal value of the property in respect of which estate duty was payable by him was the value of the equity of redemption in the property, the petitioner prayed that the deductions might be allowed on the grounds:—

1. That each of the sums of 8827*l.* and 7023*l.* represented the sale of an interest in expectancy made bonâ fide and for full consideration before the commencement of the Act, and that by reason of s. 1 and s. 21, sub-s. 3, no estate duty was payable in respect of the interests in expectancy so sold.

2. That in the alternative the sums of 8827*l.* and 7023*l.* represented, and the sums of 10,555*l.* and 55,600*l.* were, sums charged by way of mortgage upon an interest in expectancy before the commencement of the Act bonâ fide and for full consideration and, by reason of s. 1 and s. 21, sub-s. 3, those several sums should be deducted in ascertaining the principal value of property passing on the death of G. A. Vernon within the meaning of the Act, and that estate duty was payable under the Act by the petitioner in respect only of the value of the equity of redemption in the property.

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3. That by reason of s. 1 and s. 21, sub-s. 3, of the Act, the benefit arising or accruing to the petitioner after the commencement and within the meaning of the Act, s. 2, sub-s. 1 (*b*), on the cesser of the interest of G. A. Vernon in the property, extended only to the value of the equity of redemption of the property after making the aggregate deductions aforesaid from the principal value, and that in so far as the principal value of the property had been diminished by the respective sums of 8827*l.*, 7023*l.*, 10,555*l.*, and 55,600*l.*, the petitioner had not derived, nor had any one derived, benefit therefrom within the meaning of the Act by reason of the death of G. A. Vernon.

The petition concluded with a prayer for a declaration that, for the purpose of ascertaining the principal value of the property upon which estate duty was payable by him, the petitioner was entitled to deduct the said sums, amounting together to 82,005*l.*, from the sum of 86,069*l.* 0*s.* 8*d.*, and was only liable to pay estate duty on the balance after such deductions had been made; or, in any event, that estate duty was only payable, and the property charged therewith, to the extent of the sum of 4064*l.*

The following facts (among others) were admitted by the parties to the appeal.

That the Stoke Park estate was part of the property comprised in the deeds of October 15, 1877, and June 3, 1880, creating the annuities and stood charged with the annuities at the death of G. A. Vernon. That by deed of February 20, 1890, the deceased released his life interest in the Stoke Park estate to the petitioner, and that estate duty had not been paid or claimed by the Commissioners in respect of the Stoke Park estate as being deemed to pass on the death of the deceased. That the principal value of the Stoke Park estate at the death of the deceased was 12,521*l.* 18*s.* 4*d.* That the Stoke Park estate was released on or about October 30, 1890, from certain mortgages held by the National Life Assurance Society forming part of the deductions claimed in the petition.

That the annuities or clear yearly rent-charges mentioned in paragraph 4 (*a*) and (*b*) of the petition were repurchased and discharged by the petitioner on March 19, 1897, and that on

that day 8827*l.* and 7023*l.* were in fact paid to the survivor of Messrs. Pike & Howden as the capitalized value of the rent-charges granted respectively by the petitioner to Messrs. Pike & Howden, and that such payments were made by the trustees of the Leveson Vernon estate out of the proceeds of sale of a sum of 41,453*l.* 11*s.* 2*d.* Consols, which represented real property devised by the will of Leveson Vernon to which the petitioner became entitled in possession subject to the rent-charges and mortgages on the death of G. A. Vernon.

Haldane, Q.C., and *Germaine*, for the petitioner. The petitioner is entitled under s. 21, sub-s. 3, to the deductions claimed. The grants of the annuities in 1877 and 1880 were in effect sales of an interest in expectancy, sales of two reversionary annuities, and come within the very words of the sub-section; the grant of an annuity was none the less a sale because of the right to repurchase.

[KENNEDY J. That sub-section may help the purchaser or mortgagee, but how does it benefit the vendor or mortgagor?]

The vendor is in precisely the same position that he would have been in but for that exemption, in which case the purchaser would have been liable for the duty. The Act does not throw upon the vendor a liability to duty in respect of property in which he has no longer an interest; it is the purchaser who must pay. If the transactions were not sales, they were mortgages; but that does not affect the liability to duty under the Act. The effect of the sub-section is to put a mortgagee upon precisely the same footing as a purchaser, except for the proviso, which merely means that a mortgagor who has to pay duty at a higher rate, as might happen in the case of aggregation, is not to have the excess of duty made a charge in priority to the mortgagee's interest. The words "payable by the mortgagor" in the sub-section mean payable by him in respect of the equity of redemption, which is alone chargeable with estate duty; in other words, the mortgagor pays duty only upon his own interest.

The Attorney-General (*Sir R. B. Finlay, Q.C.*), *The Solicitor-General* (*Sir E. H. Carson, Q.C.*), and *Vaughan Hawkins*, for

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the Crown. The petitioner is not entitled to the deductions claimed. Sect. 21, sub-s. 3, is inserted for the protection of the purchaser or mortgagee, and not for the benefit of the owner of the estate. A mortgage by a reversioner in the lifetime of the tenant for life does not alter the amount of the property on which estate duty is chargeable: this is clear from the judgments of Lord Halsbury and Lord Watson in *Earl Cowley* v. *Inland Revenue Commissioners* (1); the same duty is payable by a reversioner on coming into his reversion whether he has incumbered or not. The effect of s. 21, sub-s. 3, is to make the purchaser or mortgagee liable only to the same duty that he would have been liable to before the Act, and to protect the mortgagee against aggregation. The deeds creating the annuities are really securities for money and not sales of portions of the estate, and can only be treated as mortgages: *Bulwer* v. *Astley* (2); *Knox* v. *Turner* (3); *Preston* v. *Neele.* (4) The distinction between the present case and *Earl Cowley* v. *Inland Revenue Commissioners* (1) is that in the latter nothing passed on the death of the life tenant but the property minus the amount of the mortgages created by him in his lifetime; in the present case the whole property passed to the reversioner, who had undertaken to pay certain sums out of it. These sums are for the purpose of estate duty mere debts of the reversioner, and do not affect the amount of the estate passing to him on the death of the tenant for life.

KENNEDY J. I am of opinion that our judgment should be for the Crown. The material facts in the case are few, and are very clearly set out in the petition. The petitioner had an interest, after the interest of the tenant for life, in certain properties comprised in wills of an early date in the century; he was the owner of the whole interest in expectancy in those properties subject to the life interest. While his interest remained in expectancy, he in effect took the benefit of that expectancy and forestalled the receipt of moneys under it in ways which are set forth in paragraph 4 of the petition.

(1) [1899] A. C. 198.
(2) (1844) 1 Ph. 422.
(3) (1870) L. R. 5 Ch. 515.
(4) (1879) 12 Ch. D. 760.

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By indentures dated October 15, 1877, and June 3, 1880, he purported to make a grant to certain trustees for insurance companies of an annuity or clear yearly rent-charge of 684*l.* charged upon the property comprised in the wills, and a further annuity or clear yearly rent-charge of 568*l.* charged upon the same property for the consideration therein appearing. Further, on October 21, 1887, by deed he charged and secured upon his interest in expectancy in the properties the sum of 10,555*l.* in consideration of an annuity granted to him of 800*l.* to be paid during certain joint lives. And, lastly, on October 30, 1890, and May 9, 1892, he mortgaged his interest in expectancy to the National Life Insurance Society for 52,600*l.* and 3000*l.* In 1896 the tenant for life died, and the petitioner's interest in expectancy became an interest in possession. Thereupon a question arose between the petitioner and the Inland Revenue authorities as to what duty he was to pay and upon what he was to pay it. The value of these properties when the reversion fell in is set out in paragraph 5 of the petition, and the petitioner is in substance seeking a declaration that for the purpose of ascertaining the principal value of the property on which estate duty is payable by him he is entitled to deduct from the total value, which is 86,069*l.* 0*s.* 8*d.*, the sum of 82,005*l.*, which according to his contention is not property in his hands liable to estate duty and passing upon the death within the meaning of the Finance Act, 1894.

It is clearly settled, and indeed is practically not disputed, that, as laid down by Lord Watson in *Earl Cowley* v. *Inland Revenue Commissioners* (1), the fact that the petitioner had by his own act anticipated his interest in the reversion by dealing with it beforehand and receiving these moneys is no reason in itself for his not being properly chargeable with estate duty in respect of that property. It is sought, however, to bring him within what is claimed as a benefit to which he is entitled under s. 21, sub-s. 3, and to treat him as a person who, in regard to the indentures of 1877 and 1880, had actually sold—not mortgaged, but sold—his interests, and it is contended that, taking all the dealings together, to the extent of the

(1) [1899] A. C. 198.

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amounts which were so disposed of within s. 21, sub-s. 3, he is liable only to the duty in respect of that which remains after all has been satisfied out of his reversion which has to be satisfied according to contracts that he had made; in other words, that under s. 21, sub-s. 3, all that he is liable to pay duty upon is the equity of redemption in this property.

As regards the special point which has been raised upon the indentures of 1877 and 1880, I am of opinion that the petitioner's contention fails, and that those transactions cannot be treated as sales in which the persons with whom the petitioner was thereby contracting became purchasers. I think that the transactions were in the nature of mortgages; certainly they were not sales which created the relation of vendor and purchaser. Looking at the sub-section, and reading it in connection with the general scope of the Act, I think that it is intended for the protection of persons who have entered into relations for full consideration in money or money's worth, and not for the protection of those who as mortgagors or sellers had dealt with them. It was thought wrong that when a bargain had been made for full consideration in money or money's worth the increased duty payable under the Act of 1894 should fall upon them—that when they came into possession of the property in expectancy which they had bought, or of which they had become mortgagees, they should become liable to have this increased charge borne by them or come in front of their interest. In my opinion, therefore, the sub-section is to be read as relieving such purchasers or mortgagees, and not as affecting the quantum of property upon which the mortgagor is liable to pay when the property passes on the death of the tenant for life. The sub-section runs: "Where an interest in expectancy in any property has, before the commencement of this part of this Act, been bonâ fide sold or mortgaged for full consideration in money or money's worth, then no other duty on such property shall be payable by the purchaser or mortgagee when the interest falls into possession than would have been payable if this Act had not passed"; that is, only the old duty is to be payable; then the sub-section proceeds: "and in the case of a mortgage, any higher duty payable by

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the mortgagor shall rank as a charge subsequent to that of the mortgagee." The sub-section is not there dealing with the relief of a mortgagor so as to make him liable only to duty upon the value of his equity of redemption; it does not touch that interest at all; what it does touch is the interest of the mortgagee in not becoming subject, as he would have been but for the proviso, to a charge ranking upon the subject-matter of the security for the higher duty which is imposed by the Act. I think, therefore, that the petitioner does not bring himself within this sub-section. The principle upon which the petitioner is liable for duty upon the whole estate seems clearly stated by Lord Watson in *Earl Cowley* v. *Inland Revenue Commissioners* (1), and it seems to me that his claim fails.

It is said—and I share with my brother Phillimore the feeling of the importance of reading the sub-section with a view to such a possible contingency—that the result of our holding as we do may possibly be that the mortgagor may have to pay in duty a sum exceeding the actual benefit derived by him, and I think that, where a possible hardship is shewn to arise from legislation of a subsequent date, one ought to look carefully at the Act to see (just as it is a proper consideration for a mortgagee or purchaser) whether it does not also contain something which would prevent a loss of that kind falling upon the mortgagor. I cannot find any such provision in the Act. Speaking for myself, the fact of the existence of the hardship would not prevent my finding in favour of the Crown if relief cannot fairly be found in the Act itself. It is quite true, as the Solicitor-General pointed out, that by reason of subsequent legislation hardships are often inflicted, or losses often fall, upon persons who are not specially provided for by way of compensation, and who could not foresee the subsequent legislation which affects them, and which if foreseen would have affected the terms of prior bargains; but at the same time one would be reluctant to suppose that the Legislature had not dealt with any reasonable case of hardship, and one would anxiously seek to find in the terms of the Act of Parliament some provision

(1) [1899] A. C. 198.

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that would prevent its arising. In my opinion it is impossible fairly to find any such provision in this section, and therefore, whatever the result, I feel bound to come to the conclusion which I have stated. I will only add that, looking to the fact that the Stoke Park property, which is not dealt with under the Act and which devolved upon the petitioner in such a way as according to the decided cases would not make it property that passed to him on the death, and having regard to the further fact that that property is one of the properties upon which the annuities are chargeable, it is, at any rate, possible that no hardship will occur. In my judgment the petition fails, and the Crown is entitled to the duty which it claims.

PHILLIMORE J. After the elucidation which the facts and the law in this case have received during the argument, I am satisfied that our judgment should be for the Crown. The case for the petitioner is based upon s. 21, sub-s. 3, of the Finance Act, 1894. First of all, he says that particular transactions by which he anticipated his reversionary interest were purchases, or sales by him and purchases by the recipients. I am clear that they were not; they were mortgages, and not sales. If they are not sales, they are either mortgages or they do not come under the provisions of s. 21 at all. Assuming, as perhaps would be rather the more favourable view for the petitioner, that they are mortgages, then it seems obvious to me that the last clause of sub-s. 3 does not help him: it does not deal with any personal payment by the mortgagor at all; it does not protect the mortgagor; it simply protects the mortgagee; it does not impose a duty upon the mortgagor, nor does it take anything away from him; it assumes that the duty is already payable. Therefore, but for one point which I am going to mention, the case might be disposed of in the shortest possible manner: mortgagors are not specially protected, only vendors are (if indeed they are), and the petitioner is either a mortgagor, or he is not within the section at all.

But my difficulty arises upon a possible state of things which was pointed out during the argument. Both under the Act of 1894, and still more under that of 1900, cases may arise where,

owing to all the property being aggregable for duty and the rate of duty being very high, the duty upon the mortgaged property which the mortgagor would have to pay would be more than the value of the equity of redemption; and while on the part of the petitioner this has been suggested as a grievance, it has been boldly accepted on behalf of the Crown, at any rate by the learned Solicitor-General, that a mortgagor in that case might be personally accountable. I presume that in cases like this the personal liability of the mortgagor rests upon s. 8, sub-s. 4, of the Act of 1894—at any rate, no other clause fixing his liability has been suggested, and I have been unable to discover one—and the effect of that sub-section is that he is only liable to the extent to which any property passes and a beneficial interest in possession is acquired. It may be that in the suggested case nothing passes to him, that only a damnosa hereditas passes, and no beneficial interest whatever. At present we have not heard the matter thoroughly argued; but I am compelled to think that it was not the intention of the statute that a man who really receives nothing is to have what would otherwise have been a beneficial estate turned into a debt to the Crown upon the death of his predecessor under the settlement. If that be the case with regard to instruments by which he anticipates his reversion with knowledge of the Finance Act—and I incline to think that it would be so even with regard to such instruments—I feel confident that if an attempt were made to make a man a debtor to the Crown in respect of transactions prudently and reasonably executed before the passing of the Finance Act, and to say that, though at the time he had the reasonable expectation of being able to pay all his debts to the Crown and to satisfy the incumbrances he had created, he is to be made a debtor to the Crown by reason of a statute passed retrospectively at a time when he cannot avoid his previous transactions, I feel confident that if the Crown ever attempts to push that contention a way will be found of shewing that such a contention must be mistaken. However, in this case I go a good deal further on the facts than my brother Kennedy has done. If the facts were as he has left them, I should still be in difficulty, because I think that if s. 8, sub-s. 4, applies in

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Phillimore J.

the way I have suggested, it is not for the taxpayer to shew that he is not beneficially interested, but for the Crown to shew that he is; but upon the documents in the present case I think that the Crown does shew that there is a beneficial interest left to the taxpayer. It is true that only 4064*l.* remains of this particular estate, and it is true that at the rate of 6 per cent., which we are told is the rate of duty on the gross property mortgaged and unmortgaged of this estate, the duty would amount to 5164*l.*, or 1100*l.* more than the residue. But it appears from the deeds and the admissions that two annuities, the capitalized value of which is upwards of 15,000*l.*, are also charged upon the Stoke Park estate, which, having been surrendered in the lifetime of the tenant for life, is not subject to duty, and that the Stoke Park estate is worth about 12,000*l.* Putting 2000*l.* or 3000*l.* only of the value of the annuities upon that estate, as might very well be done, there is a beneficial residue left to the mortgagor, and it is upon that ground, and upon that ground only as at present advised, that I give judgment for the Crown.

Judgment for the Crown.

Solicitors for petitioner: *Ford & Co.*

Solicitor for the Crown: *Solicitor of Inland Revenue.*

W. J. B.

Approved. THEOPHILE *v.* SOLICITOR-GENERAL. [1950] 1 All E.R. 405.

[IN THE COURT OF APPEAL.]

1900
Dec. 7.

In re WORSLEY.

Bankruptcy — Married Woman — "Carrying on" Business separately from Husband—Unpaid Debts—"Absenting"—Act of Bankruptcy—Liability of Married Woman to Bankruptcy Laws—Receiving Order—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 5—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*d*).

A married woman who has sold a business carried on by her separately from her husband must be deemed to be still "carrying on" the business within s. 1, sub-s. 5, of the Married Women's Property Act, 1882, so long as the debts she has incurred in the business remain unpaid; and therefore, in such a case, she is subject under that sub-section, in respect of her separate property, to the bankruptcy laws, so that a receiving order may be made against her at the instance of a trade creditor.

In re Dagnall, [1896] 2 Q. B. 407, approved.

A married woman who has bought a business out of her separate estate, and is carrying it on as her own, is not the less "carrying on a trade separately from her husband" within the above sub-section because the business happens to be carried on in the house in which she and her husband are living and the husband may be taking some part in the management of it.

A married woman who, while carrying on a business separately from her husband, leaves her place of business without paying her creditors or notifying her change of address, commits an act of bankruptcy by "absenting herself with intent to delay or defeat her creditors" within s. 4, sub-s. 1 (*d*), of the Bankruptcy Act, 1883, even though she leaves at her husband's request in order to live with him elsewhere.

APPEAL by the debtor, a married woman, against a receiving order made by one of the registrars in bankruptcy.

William Henry Worsley, the husband of the debtor, formerly carried on business as a furniture dealer and metal polish manufacturer at Manchester, and afterwards formed the business into a company, but in 1898 he was adjudicated a bankrupt, and he was still undischarged. Shortly afterwards the business was purchased by the debtor, his wife, with money forming part of her separate estate, and she then proceeded to carry on the business, under the name of "The Uneedit Company," in part of a private house called "Invermark," 115, Upper Brook Street, Manchester. The house stood at the

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corner of Upper Brook Street and Dover Street. The front entrance was in Upper Brook Street, but the back entrance, by a yard door, was in Dover Street, the door being marked as a separate house, "14, Dover Street," and bearing the words "The Uneedit Company." The greater part of the house was used as the private residence of Mr. and Mrs. Worsley and their children, Mrs. Worsley's business being carried on at the Dover Street side, and Mr. Worsley taking some part in the management.

In January, 1900, a Mr. Lambert supplied Mrs. Worsley with goods, for the purposes of her business, to the value of 174*l.* 18*s.*, for which, on January 26, 1900, she accepted, in her name, and trading as "The Uneedit Company," four bills of exchange at three, six, nine, and twelve months respectively, for 43*l.* 14*s.* 6*d.* each, drawn by Lambert.

In January, 1900, Mr. Worsley went with his children to London to take up a situation which he had obtained as an advertising agent, and took lodgings at 5, Bedford Place, Bloomsbury. Some three weeks afterwards, in February, Mrs. Worsley sold the business to a limited company, which, however, did not continue the business in the same premises: and on February 11 she shut up the house, left Manchester, but without leaving any address, and joined her husband and children in London at 5, Bedford Place. On April 16, 1900, having obtained a better situation, Mr. Worsley, with his wife and children, left the lodgings at 5, Bedford Place, but without leaving any address, or any information where they were going.

When the first two bills became due, the first on April 26, and the second on July 26, 1900, they were dishonoured, and Lambert commenced actions thereon. Efforts to serve the writs upon Mrs. Worsley personally having proved unsuccessful in consequence of her address being then unknown, Lambert obtained orders for substituted service of both writs, and on July 14 and September 8, 1900, obtained final judgments for the amounts of the two bills and costs against Mrs. Worsley's separate estate. On October 3, 1900, he presented a bankruptcy petition against her as "Jeannie Worsley, trading as

the Uneedit Company," asking that a receiving order might be made "in respect of the estate of Jeannie Worsley, now or lately carrying on business separately from her husband with separate estate and effects, and trading as the Uneedit Company as a metal polish manufacturer at 14, Dover Street, Manchester, in the county of Lancaster, and lately residing at No. 5, Bedford Place, Bloomsbury, in the county of Middlesex, but whose present address your petitioner is unable to ascertain." The debt was stated in the petition as 98*l.* 13*s.* 2*d.*, the total amount of the judgment debts in the two actions, and the alleged act of bankruptcy was that, with intent to defeat and delay her creditors, Mrs. Worsley had, since the month of February, 1900, "absented herself and thereafter continued to absent herself." Efforts were again made to serve the petition upon her, but without success, and on October 15, 1900, an order was made for substituted service. On November 15, 1900, a receiving order was made against her.

Mrs. Worsley appealed.

The appeal was heard on December 7, 1900.

Muir Mackenzie, for Mrs. Worsley. It is contended on behalf of the petitioning creditor that Mrs. Worsley can be made a bankrupt under s. 4, sub-s. 1 (*d*), of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), which says that "A debtor commits an act of bankruptcy. . . . . If with intent to delay or defeat his creditors he . . . . departs from his dwelling-house, or otherwise absents himself, or begins to keep house." It is said that she comes especially within the words "or otherwise absents himself." But, to render her subject to the bankruptcy laws at all, it must be shewn that she is a married woman "carrying on a trade separately from her husband" within the meaning of s. 1, sub-s. 5, of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), which enacts that "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole." Now here, the married woman is not carrying on a trade at all. She has ceased to carry on the business, having

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parted with it in February, 1900, and is, therefore, not subject to the bankruptcy laws.

In re Dagnall (1), a decision of the Divisional Court, is, no doubt, an authority against the debtor, but it it not binding on the Court of Appeal. It was there held that the married woman, who had, as here, parted with her business, was to be deemed to be carrying it on so long as the debts incurred in carrying it on remained unpaid; but this ruling is opposed to the express words of the section, and says, in effect, that the married woman shall be subject to the bankruptcy laws notwithstanding that she has ceased to carry on business.

[RIGBY L.J. Does not the section mean that she is to be treated as "carrying on" business until she has wound it up? According to your contention a married woman may carry on a trade, and in doing so incur large debts, and then say, "I will carry it on no longer," after which she is free.]

If she ceases to carry on a trade before the act of bankruptcy she, by the words of the section, ceases to be subject to the bankruptcy laws, and her original status of freedom is restored to her. The words "carrying on a trade" are equivalent to the expression "being a trader" in s. 6, sub-s. 6, of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), which has been held to mean "actually carrying on a trade," so that a trader, to come within that section, must be actually a trader at the time the debtor summons is served: *In re Reynolds* (2); *Ex parte Schomberg* (3); *Ex parte M'George* (4); and those cases should now be followed. Moreover, *In re Dagnall* (1) differs from this case in the facts, for there the married woman was possessed of separate trade property, whereas here she had no separate trade property, and yet it is sought to render liable her separate estate not employed in trade. Again, the married woman can only be subject to the bankruptcy laws when carrying on a trade separately from her husband; but according to *In re Dagnall* (1) she would, though continuing her business with her husband, be subject to those laws in respect of debts incurred previously.

(1) [1896] 2 Q. B. 407.
(2) (1882) 52 L. J. (Ch.) 431.
(3) (1874) L. R. 10 Ch. 172.
(4) (1882) 20 Ch. D. 697.

[VAUGHAN WILLIAMS L.J. referred to *Ex parte Bamford* (1) as to the practice followed until 1869. (2)]

By marriage a woman gets rid of her liability to the bankruptcy laws; and she is also enabled to avoid the consequences of bankruptcy if, having carried on a trade separately from her husband, she ceases, either voluntarily or by the compulsion of her husband, to carry it on.

The next point is, assuming the married woman was carrying on business, does she come within s. 4, sub-s. 1 (*d*), as having "departed from her dwelling-house or otherwise absented herself"? It is submitted that she is not within those words when what she does is, as in this case, to leave the house by order of her husband and go where he is dwelling. That is no more an "absenting" than where a foreigner comes to this country, contracts debts here, and then returns to the country of his domicil: *Ex parte Crispin.* (3) The mere act of the married woman here, in giving up her business and going to London to join her husband and children without sending round to her creditors notice of her change of address, does not necessarily lead to the inference that she has done so "with intent to delay or defeat her creditors." Moreover, Mrs. Worsley was carrying on the business at the matrimonial domicile, her husband being also there and, according to the evidence, taking part in its management or control: under those circumstances it may be questioned whether she was in fact "carrying on a trade separately from her husband": *In re Helsby.* (4)

Herbert Reed, Q.C., and *Hansell*, for the petitioning creditor, were not called upon.

LORD ALVERSTONE C.J. I will first deal with the contention that no trade was being carried on by this married woman separately from her husband within the meaning of sub-s. 5 of s. 1 of the Married Women's Property Act, 1882. The evidence before the registrar shews that the husband was an undischarged bankrupt, and that the business was

(1) (1808–9) 15 Ves. 449, 458.
(2) See also *Ex parte Dewdney*, (1808–9) 15 Ves. 495.
(3) (1873) L. R. 8 Ch. 374.
(4) (1894) 1 Manson, 12.

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the wife's business; and he came to the conclusion that she was a married woman carrying on a trade separately from her husband. The business was bought with her money, and the only circumstances opposed to the view that it was hers are that the house in which it was carried on was connected with the house in which the husband lived, and that he took some part in the management. In my opinion, that is not sufficient to induce us to overrule the conclusion of the registrar that there was a separate carrying on of the business by the wife.

Then, with regard to the alleged act of bankruptcy in having absented herself, it is said that as her husband had left Manchester some three weeks before the debtor sold the business to the company, and she had gone to join him in London where he was living, there was no "absenting." The question is whether, within sub-s. 1 (*d*) of s. 4 of the Bankruptcy Act, 1883, there was an absenting of herself from business with intent to delay or defeat her creditors. In my opinion, when you find a shop is shut up, no address left, and no means of finding out where the trader has gone, and when the evidence is sufficient, as it is here, to shew an intention to evade service of proceedings, that is an "absenting" within the sub-section; and it is impossible to come to the conclusion here that the mere fact of the wife leaving Manchester to join her husband in London is sufficient to induce us to take the view that there was no "absenting" within the meaning of the sub-section.

Then comes the more serious question upon the construction of s. 5 of the Married Women's Property Act, 1882. We are asked to overrule *In re Dagnall* (1), a case directly in point, in which Wright and Vaughan Williams JJ. held that, where there were debts remaining undischarged of a married woman which had been incurred in connection with a business carried on by her separately from her husband, it was no answer to proceedings in bankruptcy, at any rate in respect of those debts, to say that she had given up business before the proceedings had been actually taken.

In the present case Mrs. Worsley had accepted four bills of exchange for 43*l.* 14*s.* 6*d.* each for goods supplied in connection

(1) [1896] 2 Q. B. 407.

with the trade carried on by her under the name of "The Uneedit Company." These bills of exchange were given by the debtor trading as "The Uneedit Company," and were current at the time when the events took place which were alleged to give rise to the act of bankruptcy. Early in February she sold the business to a limited company, which does not appear to have carried on the business upon the same premises. All we know is that the place of business was shut up, and we must come to the conclusion upon the evidence that it was shut up when she left to go to London.

Mr. Muir Mackenzie has pressed us to say that *In re Dagnall* (1) was wrong, and that, in order that the married woman may become subject to the bankruptcy laws, her liability must, under s. 1, sub-s. 5, of the Married Women's Property Act, be strictly limited to the time when she is actually carrying on the trade; and that if she ceases, even by simply putting up the shutters, to carry on a trade, the Act does not apply. We might decide this case on the limited view that there were four bills of exchange, and that so long as these bills were running Mrs. Worsley was carrying on a business in connection with and for the purposes of trade. But I go further, and say that, in my judgment, the decision in *In re Dagnall* (1) was perfectly right. The question does not depend so much upon the Bankruptcy Act as upon the Married Women's Property Act. The Legislature has said that if a married woman, having separate estate, is "carrying on a trade separately from her husband," she "shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole." If Mrs. Worsley were a feme sole, of course it could not be denied that she was subject to the bankruptcy laws in respect of these debts. But it was said that, because she is a married woman, we must come to the conclusion that the words of the section meant that she was only subject to the bankruptcy laws "while" she was carrying on the trade, in the sense of actually conducting the trade, and that when she shut up the shop she was no longer subject to the bankruptcy laws. That is an

(1) [1896] 2 Q. B. 407.

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extraordinary construction of the section, and I do not think the Legislature would have passed the enactment in the form in which it has, if that had been the intention. The cases of *Ex parte M'George* (1) and *In re Schomberg* (2) were cases in which under the Act of 1869 the Court had to construe different words—that is to say, the words "being a trader"; and I think that the difference in language was enough to justify those decisions. The principle on which we decide this case was established so far back as the year 1808, as my brother Vaughan Williams pointed out during the argument, when Lord Eldon, in *Ex parte Bamford* (3), a case under the Bankruptcy Act of Geo. 3, laid down that so long as the debtor did not pay the debts he had contracted while engaged in the trade, he was to be regarded as still engaged in the trade.

In my opinion, as Mrs. Worsley has not discharged the debts incurred by her in her trade, she is subject to the bankruptcy laws and the receiving order was perfectly right. The appeal must therefore be dismissed with costs.

RIGBY L.J. I agree.

VAUGHAN WILLIAMS L.J. I agree.

Appeal dismissed.

Solicitors: *L. Weatherley; Bell, Brodrick & Gray.*

(1) 20 Ch. D. 697. (2) L. R. 10 Ch. 172.
(3) 15 Ves. 449.

G. I. F. C.

SCOTT *v.* MIDLAND RAILWAY COMPANY.

1900
Dec. 18.

Mines and Minerals—Gravel and Sand—Quarries Act, 1894 (57 & 58 *Vict.* c. 42), *s.* 1—*Regulation of Railways Act*, 1871 (34 & 35 *Vict. c.* 78), *s.* 6.

Gravel and sand are minerals within the meaning of s. 1 of the Quarries Act, 1894.

The digging of ballast by a railway company upon its own land for the purposes of the railway is not an act done "in the course of working the railway" within the meaning of s. 6 of the Regulation of Railways Act, 1871.

CASE stated by justices for the county of Norfolk.

The respondent company were the lessees, for the purpose of taking ballast, of a certain place in the parish of Corpusty, in the county of Norfolk, called the Corpusty Ballast Siding, by the side of their line of railway, and running back 150 yards from the main line, and by their workmen from time to time got therefrom gravel and sand, which was used by the respondents for the maintenance and repair of their line, and was only used for such maintenance and repair.

The place was more than 20 feet deep, with a slope of 40 feet to 50 feet in length at its deepest part, and was within the limits of deviation shewn on the deposited plans of the railway.

No abstract of the Metalliferous Mines Regulation Act, 1872, was posted up at or near the said Corpusty Ballast Siding on either of the dates specified in the informations hereinafter mentioned.

On March 15, 1900, a fatal accident occurred to one of the respondents' workmen who was engaged in taking gravel or sand from the said place. The accident was caused by the bulging out of a quantity of sand and gravel from the sloping face of the ballast siding.

No notice of this fatal accident was given to the appellant, the inspector of mines for the district, as required by s. 11 of the Metalliferous Mines Regulation Act, 1872; but it was stated by the respondents' solicitor, and the statement was not challenged, that notice was given to the Board of Trade.

Three informations were preferred by the appellant against

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the respondents under the Metalliferous Mines Regulation Act, 1872, as applied to quarries by the Quarries Act, 1894 (1)—two under s. 28 of the former Act, for having, on March 15 and March 30 respectively, failed to cause an abstract of the said Act, with the name and address of the inspector of the district and the name of the owner or agent of the mine appended thereto, to be posted up at or near the quarry, and the third, under s. 11 of the said Act, for having on March 16 failed to send to the appellant notice of the accident and of the loss of life occasioned thereby within twenty-four hours after the accident.

It was contended for the respondents that gravel and sand were included within the term "other minerals" in s. 1 of the Quarries Act, 1894, and also that, as the gravel and sand were taken for the purpose of the repair of the railway, and the ballast siding was within the limits of the land authorized to be taken for the use of the railway, it was not subject to the Metalliferous Mines Regulation Act, but was only subject to the general Railway Acts which require notice of accidents to be given to the Board of Trade.

The justices dismissed the informations on the ground that gravel and sand were not minerals within the meaning of the Quarries Act, 1894.

(1) By the Quarries Act, 1894, s. 1, "This Act shall apply to every place (not being a mine) in which persons work in getting slate, stone, coprolites, or other minerals, and any part of which is more than twenty feet deep, and every such place is in this Act referred to as a quarry under this Act."

By s. 2, "The provisions of the Metalliferous Mines Regulation Act, 1872 . . . . shall . . . . apply in the case of every quarry under this Act."

By the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 11, where in any mine to which the Act applies, loss of life or any serious personal injury to any person employed in the mine occurs by reason of any accident, the owner or agent of the mine is within twenty-four hours after the accident to send notice of it to the inspector of the district, and to be liable to a penalty in default.

By s. 28, the owner or agent of every mine to which the Act applies is to cause an abstract of the Act and a copy of the special rules made under it, with the name and address of the inspector of the district and the name of the owner or agent appended thereto, to be posted up in some conspicuous place at or near the mine where they may be conveniently read by the persons employed.

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Sir E. Carson, S.-G., and *H. Sutton*, for the appellant. Primâ facie the term "minerals" includes such things as gravel and sand. In *Midland Railway* v. *Checkley* (1), where in a Canal Act there was a reservation to the owners of the land of all mines and minerals, Lord Romilly M.R. held that the reservation included "everything except the mere surface which is used for agricultural purposes; anything beyond that which is useful for any purpose whatever, whether it is gravel, marble, fire-clay, or the like, comes within the word 'mineral' when there is a reservation of the mines and minerals from a grant of land." In *Hext* v. *Gill* (2) Mellish L.J. said that "a reservation of minerals includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning." In *Glasgow* v. *Farie* (3) Lord Herschell said: "I think that the word 'minerals' imports primâ facie, and apart from any context, all substances other than the vegetable matters forming the ordinary surface of the ground. . . . But we have to look to the context to see whether the word is here used in a more limited sense, and, if so, what is the limitation to be put upon it." The same rule is laid down in *Earl of Jersey* v. *Neath Poor Law Union*. (4) But there is nothing in the context of the Quarries Act to limit the wide primâ facie meaning of the word "minerals." The object of the Act is to protect from danger, and it is just as important that persons digging gravel and sand should not have the wall of the pit fall upon them as persons digging slate. Therefore gravel and sand must be treated as minerals within the meaning of this Act.

M'Call, Q.C., and *J. D. Crawford*, for the respondents. The context here shews that the term "minerals" was used in a limited sense. It is used in connection with slate and stone. It cannot have been intended that every country sand pit should be regarded as a quarry and be subject to the provisions of the Act. But even if gravel and sand are to be regarded as

(1) (1867) L. R. 4 Eq. 19, at p. 25.
(2) (1872) L. R. 7 Ch. 699, at p. 712.
(3) (1888) 13 App. Cas. 657, at p. 683.
(4) (1889) 22 Q. B. D. 555.

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minerals within the Act, still the Act does not apply, for the siding was within the limits of the land taken by the railway, and the ballast was dug solely for the purposes of the railway, therefore the accident occurred "in the course of working the railway" within the meaning of s. 6 of the Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78), and notice of the accident was required thereby to be sent to the Board of Trade, who, by s. 7, were empowered to inquire into the cause of the accident. It cannot have been intended that there should be two inquiries by different bodies into the cause of the same accident.

Sir E. Carson, S.-G., was not called on to reply.

KENNEDY J. In my opinion our judgment in this case ought to be for the appellant. It seems to me that every condition is satisfied which is necessary to bring the case within the Quarries Act. The Corpusty Ballast Siding is a place from which gravel or sand is taken by the company's workmen as they want it, and it is not suggested that it is not a place which in its general character is not such as to be within the purview of the Act. The object of the Act was to afford protection to, and insure investigation for the benefit of, workmen who are working in places where there are special dangers. It is by s. 1 to apply to "every place (not being a mine) in which persons work in getting slate, stone, coprolites, or other minerals, and any part of which is more than twenty feet deep." The question is whether gravel and sand come within the term "other minerals." That "minerals" in an Act of Parliament or in a legal document primâ facie includes such a thing as gravel or sand is now clearly settled by the decided cases. And I can see nothing in the nature of the Act or in the context to qualify this wide primâ facie meaning of the term. Therefore I think the justices were wrong in the view which they took. But then Mr. M'Call contended that, even if gravel or sand were minerals, the ballast siding ought not under the circumstances to be treated as a place to which the Quarries Act applied, upon the ground that it was a place in which workmen were engaged "in the course of working the

railway" within the meaning of s. 6 of the Regulation of Railways Act, 1871, and that the case of the happening of accidents in the course of working the railway was already governed by that section which required notice to be given to the Board of Trade. In my opinion, this was not an accident which took place in the course of working the railway. But even if it were, I cannot think that the obligation to give notice to the Board of Trade would relieve the company of the obligation to give the notice required by the Quarries Act also.

DARLING J. I am of the same opinion. The word "minerals" is one which at different times has been used with very different meanings. In some statutes it has a very restricted meaning, in others a very wide one. In order to determine in each case whether the word is used in a wide or narrow sense we must, as Lord Herschell said in *Glasgow* v. *Farie* (1), look at the object which the Legislature had in view. Here it is plain that the object was to prevent accidents from stones and other heavy substances falling upon workmen. And I cannot see that the prevention of accidents arising from the falling of a number of small stones was any the less within the purview of the legislation than the prevention of similar accidents from the falling of one large one. It seems to me that the object of the Quarries Act was to protect all those persons who, in working in the earth at a depth of 20 feet and upwards, had not been protected by the Metalliferous Mines Act of 1872, and the word "minerals" must be held to include gravel and sand. With regard to the point that the Quarries Act ought to be held not to apply on the ground that the case is already guarded against by the Regulation of Railways Act, 1871, I am of opinion that the accident did not take place in the course of working the railway within the meaning of s. 6 of the Act.

Appeal allowed.

Solicitor for appellant: *Solicitor to the Treasury.*
Solicitors for respondents: *Beale & Co.*

(1) 13 App. Cas. 657.

J. F. C.

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Nov. 19, 20, 21;
Dec. 20.

THE QUEEN *v.* COCKERTON.

Education—School Board—Science and Art Schools or Classes in Day Schools or Evening Continuation Schools—Power to provide out of Rates—Elementary Education Acts, 1870 *to* 1891 (33 *&* 34 *Vict. c.* 75; 36 *&* 37 *Vict. c.* 86; 39 *&* 40 *Vict. c.* 79; 54 *&* 55 *Vict. c.* 56)—*Technical Instruction Acts*, 1889 *and* 1891 (52 *&* 53 *Vict. c.* 76; 54 *&* 55 *Vict. c.* 4)—*Education Code* (1890) *Act*, 1890 (53 *&* 54 *Vict. c.* 22).

It is not within the power of a school board to provide, at the expense of the ratepayers, science and art schools or classes under the Science and Art Department in day schools, nor can a school board provide, out of money raised by rates, for instruction at evening continuation schools outside the curriculum prescribed by the Code issued by the Education Department for public elementary schools.

To educate adults in such schools by means of funds drawn from the rates is beyond the legal powers of a school board.

RULE NISI for a certiorari to remove into court three several certificates of disallowance and surcharge of T. B. Cockerton, district auditor.

By an order of the Court dated January 31, 1900, the facts were stated in the form of a special case.

The applicants for the rule were members of the School Board for London, and the respondent was the auditor appointed by the Local Government Board under the District Auditors Act, 1879, to hold the audit of the accounts of the board for the half-year ending September 29, 1898.

The auditor disallowed, inter alia, the three separate sums now in question, and surcharged them on the applicants, and on December 5, 1899, an order nisi was made by the Court calling upon him to shew cause against the issue of a writ of certiorari to remove into court the three certificates of disallowance and surcharge made by him as against the applicants.

On January 31, 1900, an order was made that the Corporation of the City of London should be at liberty to shew cause against the issue of the writ; and on May 24, 1900, a further order was made that the Camden School of Art and Science Corporation should be heard in the argument.

All the three sums the payment of which had been disallowed by the auditor had been paid out of the school fund of the board, referred to in s. 53 of the Elementary Education Act, 1870. The first of the said three sums was the payment of the sum of 32*l.* 6*s.* 10*d.* to a Mr. Langman for salary as drawing instructor. By a resolution of the board dated March 28, 1889, Mr. Langman was appointed instructor in drawing, and it was provided that he should give his whole time to the work at a salary of 300*l.* per annum, rising by annual increases of 5*l.* to a maximum of 350*l.* per annum. At Lady Day, 1898, Mr. Langman had under his supervision the instruction in drawing in 491 departments of schools containing altogether 190,268 scholars under instruction in drawing, and also in six pupil teachers' schools containing 1422 pupil teachers. The principal part of Mr. Langman's time was given to the supervision of drawing in accordance with the Code of Regulations for Day Schools under the Education Department. Among classes and schools so supervised by him were art schools and classes under the Science and Art Department of the Committee of Council on Education.

The auditor's reasons for disallowing this sum were as follows: Because Mr. Langman was employed wholly or partly in or about the instruction of classes registered under the Science and Art Department; because the said sum was not wholly paid for the performance of duties which the school board had power to assign to Mr. Langman within the meaning of s. 35 of the Elementary Education Act, 1870; because the school board have no authority in law to pay the salary of a drawing instructor in a day school where the principal part of the instruction with regard to each child is not elementary; and because a school board is not a local authority within the meaning of the Technical Instruction Acts, 1889 and 1891.

The second of the said three sums was the payment of 4*l.* to a Mr. Crick for special instruction in chemistry at the science class held at the Medburn Street Evening Continuation School. Mr. Crick was appointed by a resolution of the board dated October 21, 1897, and under that resolution he taught theoretical and practical chemistry in evening schools under the

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Science and Art Department. A large part of his duty was to supervise the science classes held in day schools and evening continuation schools. From a certificate sent in to the Science and Art Department on behalf of the board containing the arrangements for the session 1897–8, it appeared that forty-four students attended the science class at the Medburn Street Evening Continuation School and paid a fee of 4*s.* each for instruction in science. The auditor found that the payment formed part of an expenditure incurred by the school board in the maintenance and instruction in special subjects of an evening science class registered under the Science and Art Department, South Kensington, as a science class, and held at the Medburn Street School, and that the sum was paid to Mr. Crick as remuneration for giving ten lessons at 8*s.* as special instruction in chemistry to this class. He disallowed the payment because the sum was not paid to Mr. Crick for the performance of duties which the school board had power to assign to him within the meaning of clause 3 of s. 35 of the Elementary Education Act, 1870, and stated his reasons in similar form to those in the case of the disallowance of the payment to Mr. Langman.

The third of the said sums was the sum of 58*l.* paid to the Polytechnic for science and art examination papers (R. Mitchell, local secretary). Mr. Mitchell was nominated local secretary in February, 1898, and the sum was a payment made to the Polytechnic as remuneration for his services and those of his assistants in conducting science and art examinations held at several schools in May, 1898, and consisted of a charge of 6*d.* for each student presenting himself or herself for examination.

The auditor stated his reasons for disallowing this payment as follows: Because the school board have not any legal authority to use, expend, or apply any portion of the school fund in or about the instruction or examination of day schools or classes in science and art and organized day science schools registered under the Science and Art Department; because the said sum was not expended in maintaining or keeping efficient any public elementary school within the meaning of the Elementary

Education Acts; because the said sum was not paid for or in respect of the expenses of an entrance examination within the meaning of s. 2 of the Technical Instruction Act, 1889; because a school board is not a local authority within the meaning of the Technical Instruction Acts; because the school board had no authority in law to incur expenditure in the instruction of children who were not entitled to be placed on the register of a public elementary school owing to the fact that they were already registered under the Science and Art Department, and because the school board had not any authority in law to pay the said sum.

After setting out these facts the special case continued:—

"12. Until April 1, 1900, when the Board of Education Act, 1899, came into force, the Education Department, which was controlled by the Lords of the Committee of the Privy Council on Education, comprised two establishments or departments, one of which (herein called 'the Education Department at Whitehall') administered the annual parliamentary grant made for public education, including education at public elementary schools, and the other (herein called 'the Science and Art Department at South Kensington') administered the grant from the parliamentary vote made for instruction in science and art. The Science and Art Department at South Kensington was incorporated by Royal Charter. Both of these establishments were controlled by the President and the Vice-President of the Committee of the Privy Council on Education, but the administrative staff were entirely separate and had no members in common. The grant for public education was administered by the Education Department at Whitehall in accordance with the Code of Regulations for Day Schools (herein called 'the Code') and the Code of Regulations for Evening Continuation Schools (herein called 'the Evening School Code') both of which Codes were published annually by the Education Department at Whitehall. The grant from the parliamentary vote for instruction in science and art was administered by the Science and Art Department at South Kensington in accordance with the Science and Art Directory (herein called 'the Directory') which was published annually by the Science and Art Department

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at South Kensington. Each establishment or department accounted separately to Parliament.

"13. All scholars in day schools or in evening continuation schools maintained by the board or in classes under the Science and Art Department at South Kensington, held either in the daytime or the evening, were registered either under the Education Department at Whitehall or under the Science and Art Department at South Kensington. All of those scholars in day schools who were under instruction in the seven standards referred to in the Code were registered under the Education Department at Whitehall in accordance with the Code. Of the scholars in day schools who were under instruction outside the standards, some (herein called 'ex-standard scholars') were registered under the Education Department at Whitehall, and the rest (herein called 'science and art students') were registered under the Science and Art Department at South Kensington. . . . In many of the day schools maintained by the board there were both ex-standard scholars and science and art students. In some cases ex-standard scholars were taught in the same classes with science and art students. In some cases scholars in the standards were also taught in the same classes.

"14. At Lady Day, 1898, there were in London provided and maintained by the board 485 day schools containing altogether 547,106 scholars, and 280 evening continuation schools attended by about 29,153 scholars. The number of individual students under instruction in science and art schools and classes in the day schools of the board in the session 1897–8 was about 2644 in science, and about 2165 in art. The number of individual students under instruction in science and art schools and classes held in the evening continuation schools of the board in the session 1897–8 was in science about 1768, and in art about 2069. Grants were obtained by the board in respect of the students in the said schools, other than the students under instruction in science and art schools and classes, from the Education Department at Whitehall. Grants were made by the Science and Art Department at South Kensington to the board as managers under that department in respect of

the students in the said schools under instruction in science and art schools and classes.

"15. The great majority of scholars in science and art schools and classes in day schools maintained by the board were over thirteen and below fifteen years of age. All of these scholars before entering science and art schools and classes had passed through the standards in the day schools, except a few who were allowed by virtue of Clause LVII. of the Directory to enter a school of science on having received instruction up to and including the work of Standard VI. In evening continuation schools, under art. 8 of the Evening School Code, no scholar under fourteen years of age was admitted unless he was exempt from the legal obligation to attend school. There was no superior limit of age in evening continuation schools, and a great number of the scholars were adults.

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"27. The board have always obtained grants from the Education Department in respect of all their schools. Grants from the Science and Art Department have been made to them in respect of all science and art schools and classes maintained by them. Grants received from the Education Department and grants received from the Science and Art Department have in point of fact always been carried to the school fund. The board have charged no fees for instruction in science and art schools and classes provided by them, so far as day schools are concerned, since August, 1891, and, so far as evening continuation schools are concerned, since September 1, 1898.

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"29. The expenses incurred by the board in respect of science and art schools and classes under the Science and Art Department have always considerably exceeded the grants obtained from the Science and Art Department, and the deficiency has always been made good by the board out of the school fund, and the rates levied under the Public Elementary Education Acts.

"30. The Court is referred to the following documents, which are to be taken as forming part of this case.

"The Code for 1898.

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"The Evening School Code for 1897.

"The Directory of 1898.

"Calendar, history, and general summary of Science and Art Department, 1899.

"Science examination papers, April, May, and June, 1898.

"Art examination papers, April, May and June, 1899.

"Examination papers under Code and Directory.

"Specimens of drawing, casts, examples, and apparatus.

"Return of school management committee as to subjects of instruction in science and art classes.

"Reports of school management committee on sixteenth session of evening continuation schools.

"General orders of Local Government Board as to school account.

"31. The questions for the decision of the Court are:—

"(1.) Whether it was within the powers of the board as a statutory corporation to provide science and art schools or classes either in day schools or in evening continuation schools.

"(2.) Whether it was lawful for them to pay the expenses of maintaining those schools or classes out of the school board rate or school fund.

"(3.) Whether the said rule nisi should be made absolute in regard to any and which of the said disallowances and surcharges."

The Attorney-General (*Sir R. B. Finlay, Q.C.*), (*H. Sutton*, with him), for the auditor, shewed cause against the rule. The provision of science and art classes under the Science and Art Department is not a matter in respect of which the school board is justified in applying the rates. The Elementary Education Acts, 1870 to 1891, do not authorize the expenditure of money raised from rates on the kind of science and art teaching that is given by science and art classes under the Science and Art Department at South Kensington. That is provided for by the Technical Instruction Acts, 1889 and 1891. The Education Department by its Code prescribes the kind of teaching to be given in board schools, and it is of a far more

elementary character than the teaching prescribed by the Directory issued by the Science and Art Department. A comparison of the Code and the Directory shews that the teaching contemplated by the latter is of a much more advanced character than that prescribed by the Code, and it is impossible to contend that the curriculum of the Directory can in any sense be called elementary education. No doubt some of the subjects prescribed by the Code are the same as those contained in the Directory, and to the extent that those subjects are taught under the Code they are not now impugned, but the school board has no right to develop those subjects so as to bring them within the curriculum of the Science and Art Department and its Directory. The school board cannot go outside the Code. An examination of the Elementary Education Acts, 1870 to 1891, and of the Technical Instruction Acts, 1889 and 1891, shew that they relate to quite different matters. Expenditure on these science and art classes can only fall under the Technical Instruction Acts, and does not come within any of the provisions of the Elementary Education Acts. Those Acts clearly recognise that the school boards created by them have no power to apply rates for any other purpose than that of elementary education. Whatever "elementary education" may mean, it is impossible to say that the very advanced teaching given in science and art classes under the direction of the Science and Art Department at South Kensington, and in accordance with the Directory issued by that department, can come within the meaning of the expression.

Lord Robert Cecil, Q.C. (*Hon. M. Macnaghten* with him), for the Camden School of Art and Science Corporation, also shewed cause against the rule. The corporation, being bound under art. 6 of the Directory to exact fees from their scholars, are prejudiced by the free education supplied by the school board in science and art. The object of the Elementary Education Act, 1870, is (s. 5) to provide a sufficient amount of accommodation in public elementary schools for all the children resident in school districts for whose elementary education efficient and suitable provision is not otherwise made. That object is carried out by providing for grants to schools from Imperial taxation, and by

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enabling school boards to obtain aid from the local rates. Different sets of provisions with respect to those two methods run through the Act. An "elementary school" is defined (s. 3) as a school at which elementary education is the principal part of the education given. The intention of the Legislature was to provide for elementary education. The definition, therefore, includes schools in which, although the education given is not exclusively elementary education, it is mainly and substantially elementary education. The Act does not give power to create board schools in which the education should be other than elementary, but it encourages voluntary schools in which the education is mainly elementary, although other education which is not elementary may be given. Then s. 23 provides that the managers of an elementary school carried on under a trust may arrange for the transfer of the school to the school board, but the last clause of that section provides that the school so transferred shall be deemed to be a school provided by the school board—i.e., the education authorized to be given by school boards must alone be given. In the case of a re-transfer from the school board to the managers, s. 24 provides that the school shall cease to be a school provided by a school board, and shall be held upon the same trusts as it was before the transfer. The power to apply the rates is given to the school board in respect of elementary education only. The Technical Instruction Act, 1889, supports this view. Sect. 1 (*g*) provides that the amount of the rate to be raised by a local authority in any one year for supplying technical instruction shall not exceed one penny in the pound; but if the contention of the school board be right, they can apply the rates to any amount. The same argument applies to evening continuation schools. The Education Code (1890) Act, 1890, only enables evening schools to earn the parliamentary grant. The grant may be obtained in cases which come within the Code, but the Act gives no power to board schools to teach under the Directory or to apply the rates in that respect. It does not affect the limitation on the power to apply rates under the Elementary Education Act, 1870. Sect. 7, sub-s. 4, of the Act of 1870 provides that "the school shall be conducted in

accordance with the conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant." That restriction applies to all elementary schools, whether board schools or not, and the Act of 1890 only removes that restriction in regard to elementary schools which are not board schools.

Although it may be difficult to draw the line between what is elementary and what is advanced education, the science and art teaching described in the case is clearly not elementary education. Board schools have no power to teach outside the Code. They cannot expand the Code into the Directory, and obtain the Government grant by teaching under the Directory.

Danckwerts, Q.C. (*Loehnis* with him), for the Corporation of the City of London, also shewed cause against the rule. The corporation appear as ratepayers. It is unnecessary to consider what the school board may teach; the question is, What may they teach at the expense of the rates? It is probably unnecessary also to determine exactly what the term "elementary education" means. Two departments are concerned—the Education Department at Whitehall, and the Science and Art Department at South Kensington—and the teaching which is in question here has been at the dictation of the Science and Art Department. The two had for many years prior to the passing of the Elementary Education Act, 1870, existed and were recognised as separate departments, and are so recognised by the Legislature in that and in the subsequent Acts which have been referred to. Expenditure under the Science and Art Department is not expenditure for elementary education under the Act of 1870. Under ss. 53 and 54 the expenses of the school board "under this Act" are provided for, and the school board can only require the aid of the rates in order to supply deficiencies in those expenses. Sect. 5 points out the object of the Act for which expenses can be incurred. That object is, to provide sufficient accommodation in public elementary schools available for children for whose elementary education efficient provision is not otherwise made. Sect. 4 of the Elementary Education Act, 1876, indicates what is meant by

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elementary education, becauses it imposes upon parents the duty of causing their children to receive "efficient elementary instruction in reading, writing, and arithmetic." The title of the Act of 1870, which is "an Act to provide for public elementary education in England and Wales," indicates the limits of the education intended to be provided in public elementary schools, and the title of an Act of Parliament is to be read as part of the enactment: *Fielding* v. *Morley Corporation.* (1) The definition in s. 3 of an "elementary school" means that the principal education of each child in the school is to be elementary education. The education in science and art given under the ægis of the Science and Art Department is altogether outside the education provided for by the Act of 1870. As to evening schools, the provision in s. 1 of the Act of 1890, that the principal part of the education need not be elementary, is only for the purpose of enabling evening schools to obtain the parliamentary grant. Those schools must be carried on by parliamentary grants or by endowment.

Asquith Q.C., and *Llewelyn Davies*, for the London School Board, in support of the rule. The auditor was wrong in disallowing and surcharging the sums in question. There is no definition of "elementary education" in the Elementary Education Acts, though it is true that the Act of 1876 imposes the parental duty of causing elementary instruction to be given in reading, writing, and arithmetic. The Legislature in 1870 meant to leave a large discretion as to what should be considered elementary education, having regard to the altered social and economic conditions then existing. It is not necessary in the present case to attempt an accurate definition of the term. But the Legislature in s. 3 of the Act of 1870 has carefully defined "elementary school" as meaning a school at which elementary education is the principal part of the education there given. All depends upon that definition. It means that elementary education must be mainly given at the school—not necessarily to each child. When the "principal part" of the education given at the school is elementary, then the power to apply the rates in aid of the expenses of the education which is

(1) [1899] 1 Ch. 1.

in fact given there applies. Medburn Street School, on the facts stated in the case, is within that definition. Sect. 5 does not intend to impose the limitation which has been suggested. Sects. 5 and 6 only mean that where the Education Department think that there is an insufficient supply of elementary education in a school district, they may call in a body, called the school board, to provide elementary schools. Sect. 7 provides that every elementary school which is conducted according to the specified regulations shall be a "public elementary school," and s. 14 provides that every school provided by a school board shall be under the control and management of the board, and shall be a "public elementary school." The introduction of the word "public" has some bearing upon the question whether instruction to classes in science and art, in respect of which aid may be obtained from the public department of science and art, can be supplied to board schools, and paid for, to an extent, out of the local rates. The Code which is provided by the Education Department under s. 97 in no way affects the question here. The Technical Instruction Act, 1889, is, it is submitted, a statutory recognition that board schools may obtain aid from the local rates in respect of instruction in science and art. Sect. 1, sub-s. 1, empowers a local authority from time to time out of the local rate to supply, or aid the supply, of technical instruction subject to the restrictions set forth. Clause (*d*) of sub-s. 1 provides that a local authority may on the request of the school board make, out of any local rate raised in pursuance of the Act, subject to the prescribed conditions and restrictions, provision in aid of the technical instruction for the time being supplied in schools or institutions within its district. By sub-s. 3 nothing in this Act shall be construed so as to interfere with any existing powers of school boards with respect to the provision of technical instruction. By s. 2 the school board may institute an entrance examination for persons desirous of attending technical schools or classes under their management or to which they contribute. With respect to evening continuation schools the case is still stronger, because the Education Code (1890) Act, 1890, s. 1, removes the condition that

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elementary education shall be the principal part of the education given.

Cur. adv. vult.

Dec. 20. WILLS J. read the following judgment:—The concrete question we have to determine is whether certain items in the accounts of the London School Board have been properly disallowed by the auditor. It is common ground that such a question involves the inquiry whether the expense of maintaining either schools or classes of science and art in which the teaching follows the lines laid down by the Science and Art Department in its "Directory," as distinguished from those laid down by the Education Department in its "Code," can be thrown upon the rates by which the board schools are maintained or assisted. The latter question is not, in my opinion, and for reasons which will hereafter appear, exhaustive, but it may be usefully dealt with in the first instance.

It will be convenient, and indeed necessary, to preface a discussion of the Acts of Parliament the construction of which is involved by a short statement as to the constitution and functions of the two departments.

The "Education Department" means (52 & 53 Vict. c. 63, s. 12), in the phraseology of the first Elementary Education Act, and that of every other Act, unless a contrary intention appears (which it never does), "The Lords of the Committee of the Privy Council on Education." It is a department of Government having offices at Whitehall and exercising a number of definite functions. It had existed for many years before the first Elementary Education Act of 1870. It was, in fact, a Government office for the conduct of which the Lord President of the Privy Council was the Minister responsible to Parliament; and for many years before 1870 Parliament had annually allotted to it in the Appropriation Acts large sums of money for the promotion of public education to be distributed under rules framed by the department. The distribution took the form of grants made to schools carried on otherwise than for private profit. The Science and Art Department was also a branch of the establishment of the Lords of the Committee of the Privy Council on Education,

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and separate grants were made to it which were similarly distributed under its regulations to schools and institutions not for private profit where science or art was taught. It is described as having then been "a department of the Government established for the promotion of science and art, and being under the superintendence of the Lord President of the Privy Council and the Vice-President of the Committee on Education of the Privy Council," but in the year 1864, by a Royal Charter, from the recitals in which the foregoing description is taken, the Lord President of the Privy Council for the time being, and the Vice-President of the Committee on Education for the time being, were constituted a body corporate with perpetual succession, a common seal, &c., under the name of the Department of Science and Art. And, therefore, in 1870 the two departments, though having no doubt a common policy, were essentially distinct, and it is only in popular language that they can be described as branches of the same administration. The Science and Art Department has for very many years had its offices and its seat of administration at South Kensington. The form which the grants assumed in the Appropriation Acts was generally "for public education in Great Britain" and "to defray the expenses of the general management of the Department of Science and Art of the schools throughout the kingdom in connection with the department, and of the Geological Survey of Great Britain and Ireland." The same language was used in the Appropriation Act of 1864, which received the Royal assent three months later than the date of charter of incorporation of the Science and Art Department. In 1865 the two grants were (1.) "for public education in Great Britain"; (2.) "for the general management of the Department of Science and Art and of the establishments connected therewith." In 1867 the first vote was described as "for public education in England and Wales, including the expenses of the Education Office in London." In 1868 the second vote was described as "for the salaries and expenses of the Department of Science and Art and of the establishments connected therewith," and since these respective dates practically the same designations have been

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used in every Appropriation Act down to the present time. The departments were, therefore, in 1870 separate in name, separate in local habitation, separate in constitution, and separately entrusted with public funds to be administered by each department independently of the other. Each has from time to time published its own prospectus and laid down for itself the conditions under which it would make grants from the annual vote to schools and institutions engaged in teaching. For the sake, I presume, of avoiding confusion, the Education or Whitehall Department has called its syllabus of conditions "the Code." The analogous publication of the Science and Art or South Kensington Department has been called "the Directory." A comparison of the Code and Directory now in force shews that the Code deals with many subjects not embraced by the Directory and with an education much less advanced in the subjects common to both than those dealt with by the Directory. To some extent the course of study with which the Whitehall establishment is concerned in the common subjects may overlap the lower portions of the South Kensington scheme, but the broad distinctions remain that the South Kensington curriculum, while narrower than the Whitehall scheme, is of a much more advanced character. South Kensington makes grants substantially larger than Whitehall, and the extreme limit of the teaching which it aims at encouraging reaches a very high standard and extends into the higher mathematics, into chemistry of a very advanced character, both theoretical and practical, into hygiene, geology, physiography, and a multitude of subjects in the domain of science which are carried as far as might well suffice to give a successful student a high place in a Tripos or on the honour lists of most of our Universities. The department aims at the encouragement of what it calls science schools and science classes as well as schools of science. A school of science is an establishment with all the necessary staff and appliances for a complete and methodical scientific education adapted for students whose education is such as would fit them to enter Standard VII. of the Code (see Directory, arts. 56, 57, and *passim*). No definition is given of science schools and science

classes, but they are at all events schools and classes of the South Kensington as distinguished from the Whitehall type, and giving instruction in the subjects which they may happen to teach, aiming at the South Kensington standard and intended to earn the South Kensington grant.

The Act upon the provisions of which the present questions chiefly turn is the Elementary Education Act, 1870 (33 & 34 Vict. c. 75). By s. 5, where in any school district (as defined by the Act) there is not a sufficient amount of accommodation in public elementary schools, in the Act referred to as "public school accommodation," available for all the children resident in such district for whose elementary education provision is not otherwise supplied, the deficiency shall be supplied in manner provided by the Act—that is to say, by the creation of a school board and the establishment of board schools. By s. 19 the school board may, for the purpose of providing sufficient "public school accommodation" provide schoolhouses and supply everything necessary for the efficiency of the schools provided by them. By s. 53 the expenses of the school board shall be paid out of the school fund, which is to consist of fees from scholars, money provided by Parliament or raised by loan, or in any manner whatever received by the school board, and any deficiency is to be made up out of the rates to be raised as provided by the Act.

The condition, therefore, of the existence of a school board, other than the School Board for London, is the want of proper provision by the existing schools for the elementary education of all the children in the district; and in determining the question whether such deficiency exists the Education Department is to take into consideration every school in the neighbourhood which gives efficient elementary education to the children in the district. The School Board for London was constituted by s. 37 of the Act without such inquiry, it being assumed, apparently, that there was no need of it. The board is directed to "supply their district with sufficient public school accommodation" (defined in s. 8), which is exactly what every other school board has to do, and I cannot find in the Act any trace of any difference between

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the powers and duties of the School Board for London and those of any other school board. Wherever the deficiency does exist it is to be supplied by accommodation in public elementary schools as therein defined. This throws us upon s. 7, which enacts that every elementary school which is conducted in accordance with the regulations that follow shall be a public elementary school.

I pause here to say that in s. 3 an elementary school is defined as meaning "a school or department of a school at which elementary education is the principal part of the education there given," so that s. 7 says that every school at which elementary education is the principal part of the education there given shall be a public elementary school if it conforms to the regulations therein contained, and as a board school by s. 14 must be a public elementary school, it follows that it must be conducted in accordance with those regulations. The only regulation that is material here is that it shall be "conducted in accordance with the conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant" (sub-s. 4). A parliamentary grant means (by s. 3) "a grant made in aid of an elementary school . . . . out of moneys provided by Parliament for the Civil Service intituled 'for public education in Great Britain,'" which, as I have shewn, is always a distinct thing from the grant to the Science and Art Department, and is the fund which, from its establishment, has been administered by the Whitehall or Education Department. The conditions in question, by s. 97, "shall be those contained in the minutes of the Education Department in force for the time being"—i.e., in the present case, the Code of 1898. That Code provides for certain subjects as obligatory, and unless they are taught to the satisfaction of the department no grant can be obtained. Additional grants can be earned by efficient teaching in the other subjects mentioned as optional, the grant being so much per head in respect of scholars shewing a certain proficiency. The board school, therefore, under the Act of 1870, must be one in which the principal part of the education is elementary, and, as the school board cannot come into existence unless there is a deficiency in the provision in the district for

elementary education, it might very well have been enacted that the education to be provided out of the rates should be elementary only. Indeed, such would have been the natural conclusion had not a contrary intention appeared. I think, however, that it does appear. The definition of "elementary school" is not that it shall *include* a school in which the principal part of the education is elementary, but that it *means* such a school; and I do not see how any other conclusion can be arrived at than that the board schools may go beyond mere elementary education if the school board be so minded. It is quite clear to my mind that they are under no *obligation* to go beyond the subjects and the amount of education required by the Education Code in order to earn a parliamentary grant. The extent of this obligatory teaching, though a varying quantity, has always been extremely moderate. But I see no indication of anything like a definite superior limit to what may be taught except in so far as such a limitation is involved in the proposition which I hope in due course to make clear—namely, that the only education contemplated by the Act as within the province of the school boards is education for children.

I think there was good reason for the abstention in the Act from any provisions for a superior limit. The work of the Education Department in 1870 and for some two or three years later had very modest aims, and did not go beyond reading, writing, and arithmetic. No doubt the general standard of primary education was then extremely low. It must have been evident to every one that if reading, writing, and arithmetic were properly taught there would soon be a great many children who, if they were to be taught anything fresh during their childhood, must learn something beyond that restricted range of instruction, and that there would certainly be exceptional children who could go far beyond it. The Code at that time provided for no grants for any instruction beyond what have been called the three R's. I cannot believe for a moment that it ever was intended that in board schools nothing beyond the very low standard to which alone elementary education as then understood had reached should be aimed at by the board schools. The legislation is general. It applies alike to board schools

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and to schools—not for private profit—maintained out of endowments or by voluntary contributions. Neither the Acts nor the Code are confined to either voluntary schools or board schools. A vast deal of confusion and misunderstanding has, I think, arisen from a failure to appreciate this cardinal fact, and the most extravagant arguments have been founded upon the use of expressions of a general character and intended to apply to all elementary schools (as defined by the Act) and upon the application of them as if the board schools were the only schools with which they dealt.

It seems to me, therefore, that so long as the board school is devoted principally to elementary education there is not only no provision, express or implied, that the instruction shall not go beyond it, but a distinct intimation that it may, and that the only condition expressly imposed as to the quantum of education is that it must at least come up to the lowest standard required in order to obtain a parliamentary grant—i.e., must satisfactorily teach the obligatory subjects. Such subjects must almost necessarily form the principal part of the instruction to be administered in a board school which admits children from five years of age upwards, and to which children from five till fourteen can be compelled to go. The higher the age the fewer the children, inasmuch as every child of ten or twelve must have been a child of five, whereas it is not every child of five who lives to be ten or twelve.

There is, however, as it appears to me, a very important and a very reasonable practical limit imposed on the education to be given at board schools. From first to last the whole series of Acts relating to this subject, which are invariably designated as the Elementary Education Acts, deal with children. No definition is given of "elementary education," which is obviously a term that may shift with the growth of general instruction and attainment. The Code, in many instances, draws a line, in dealing with subjects for which grants may be made, between the elementary and advanced stages, but such division affects only the amount of the grants, and has really no bearing at all upon any question involved in the present case. Except for the purposes of one

Act, dealing with compulsory attendance, no definition has been given of a "child." It is impossible to lay down any definite boundary as separating "children" from "young men" or "young women," or any other description by which an advance beyond childhood may be indicated. Practically I suppose that at somewhere between sixteen and seventeen at the highest an age has been arrived at which no one would ordinarily call childhood. It seems to me that as far as mere quantum is concerned, any education suitable for a child may be given by the school board, but that the one condition must always be fulfilled by the school—namely, that it is conducted in accordance with the conditions required to be fulfilled by an elementary school in order to obtain a parliamentary grant, which by the interpretation clause means the Whitehall grant.

I think the clear intention of Parliament was to place the elementary schools under the sole administration of Whitehall. South Kensington is never alluded to. The Code at one time placed one of its subjects—drawing—under the Science and Art Department, but always with this proviso—that the grant would come from that department. Of course, there was nothing to prevent either department from making or withholding a grant upon any terms not inconsistent with the Acts which it chose to impose, but that has absolutely nothing to do with what the public elementary school may or may not do. That depends entirely upon the Act of Parliament, which meant, I think, to give to public elementary schools of every sort the same rights and to subject them to the same control; and I think s. 7, sub-s. 4, meant to place them all under the control of Whitehall, and to say that all *must* teach what Whitehall laid down as obligatory in order to get a grant, and that in regard to instruction outside that narrow area, if and in so far as it was given, it was to follow the rules of the Whitehall Code, whatever they might be, from time to time.

I have dealt at considerable length with the Act of 1870, because I believe that it strikes the keynote of all the subsequent legislation on this subject. Between 1870 and 1893 no fewer than nine Acts supplementary to the principal Act were passed, and in every Act the same phraseology is kept up, and in the

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last of them (the Elementary Education (School Attendance) Act, 1893 (56 & 57 Vict. c. 51)), the whole of the preceding Acts are styled "The Elementary Education Acts, 1870 to 1891." In 1873 an Act was passed (36 & 37 Vict. c. 86) under which a school board was enabled, with certain exceptions not material, to accept and administer any educational trust or endowment. It was provided (s. 13, sub-s. 2) that every school connected with such a trust or endowment shall be deemed to be a school provided by the school board—in other words, a board school. But then follows the significant qualification that nothing in that section shall authorize the school board to expend any money out of the school rate for any purpose other than elementary education. That is to say, no additional burden was to be thrown upon the rates in order to carry out the objects of the trust or endowment. The same Act, in s. 22, refers to "registers and other books and documents containing information with respect to the attendance of *children*" at the board school, and ss. 24 and 25 contain various other provisions with regard to the attendance of *children*. The Act of 1876 enacts that it shall be the duty of the parent of every *child* to cause such child to receive elementary instruction in reading, writing, and arithmetic, and is full of provisions about "*children*" attending the school.

Further control in respect to the degree of instruction and efficiency required to obtain certificates of exemption from attendance at school is given to the Education Department by s. 24, thus enabling them to raise the standard from time to time.

A child is defined to mean *in this Act* a person between five and fourteen (s. 48). The only place in which the word "scholars" and not "children" is used is in a section which refers to schools that are not board schools (the third paragraph of s. 48).

The next important Act was that of 1891, which abolished school fees for children between three and fifteen. It appears, I think, to assume that there may be children over fifteen years of age attending the board schools, but I can find no phrase or expression indicating that anything but children were contemplated. Stress has been laid upon the use of the word

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"scholars" (not "children") in s. 8, which provides that nothing in s. 17 of the Act of 1870 shall prevent a school board from admitting *scholars* to any school provided by the board without requiring a fee, as if it indicated that the Acts applied to scholars who are not children. But inasmuch as s. 17 applies to children, and children only, there is absolutely nothing in this argument.

The two passages just referred to are the only ones in the whole series in which the pupils are referred to otherwise than as children. The Act of 1893 (56 & 57 Vict. c. 51) simply raises the age under which a child cannot be employed except under a certificate of exemption from ten to eleven.

Reference has been made in the course of the argument to the Technical Instruction Act, 1889 (52 & 53 Vict. c. 76), but, as it relates entirely to schools to be established and maintained by various local authorities, the enumeration of which excludes school boards, and the only parliamentary grant contemplated by it is one by the Science and Art Department, its bearing upon the present question is so extremely remote that it is not worth serious consideration. Sect. 1 (*a*) says in effect that the local authority shall not supply or aid the supply of technical or manual instruction to scholars receiving instruction at an elementary school in the obligatory or standard subjects prescribed by the minutes of the Education Department. Another clause—s. 1, sub-s. 3—says that nothing in the Act shall be construed, so as to interfere with any existing powers of school boards with respect to the provision of technical and manual instruction. But, in the first place, I suppose that it never would have entered into any one's head to doubt that some technical and manual instruction may properly fall within elementary education, and, further, such instruction had by that time found its way into the Code. In my opinion, therefore, the board schools can provide instruction more than elementary so long as it is for children, but are placed expressly under the Whitehall Department, and, in so far as they teach either elementary or advanced subjects, must conform to the Whitehall Code. It follows that they have no statutory authority to do more, and, therefore, if they do go substantially beyond it, must not

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spend the ratepayers' money upon the excess. In so far as, while following the Whitehall Code, they may be able to earn the South Kensington grants, I see nothing in the Acts to prevent them from doing so; but, as far as I can gather the facts from the very obscure case in which they are stated, the money expended upon science schools and science classes in respect of which the disallowances were made by the auditor were those which were incurred by teaching the South Kensington subjects in accordance with the South Kensington Directory.

So far, what I have said applies equally to day schools and evening schools. Before I proceed to deal specially with the evening schools, I think it may be useful to trace succinctly the course of action which has been followed by the Education Department. By the courtesy of the Education Department I have been able to see the whole of the Codes from 1870 to 1898, and the following summary may be relied upon as accurate, though it does not profess to be absolutely exhaustive. Down to and including 1891 there was one Code embracing both day schools and evening schools, though the regulations applying to each have long been on somewhat different lines. From 1870 to 1874 the only education contemplated or spoken of was in reading, writing, and arithmetic. Various modifications had taken place between 1870 and 1875, always in the direction of what I may call natural development, but always confined to these three subjects. But in 1875 a change of the most far-reaching kind was made. To the three elementary subjects were added grammar, geography, and history; a long list was also given of subjects called "specific," for proficiency in which a grant could be made. They included mathematics, Latin, French, German, mechanics, animal physiology, physical geography, botany, and domestic economy (this for girls only). This alteration was coincident with no fresh legislation, but was solely a departmental act. It was, in my opinion, entirely within the competence of the department, and it could have no operation unless the Legislature granted the necessary supplies. What is its effect upon the limits of education to be observed in board schools is a totally different matter, which I will deal with in its proper place. The successive Codes for some years

made no further change, except in the shape of a continual increase in the extent to which the teaching was to be carried. But in 1882 there was a further change of an important character. In this Code, as in all the subsequent ones, the subjects for which grants could be made are divided into two classes, obligatory and optional, and for the first time it is stated with regard to evening schools that no attendance of a person over twenty-one or under fourteen will be recognised for a grant. The optional subjects are subdivided into class subjects (to be taken by classes) and again specific subjects (to be taken by individuals). It is a curious fact that, though the specific subjects would naturally be selected by the more advanced scholars, who may be between twenty and twenty-one, a note is appended to the schedule of specific subjects that the science subjects are to be taught chiefly by experiment and illustration, inasmuch as if they are taught to *children* by definition and verbal description they will be worthless as means of education. This note did not drop out till 1893, when I suppose it struck some one as absurd under the existing conditions. The Code for a long time coquetted with drawing. It was introduced in 1885 as an optional class subject; in 1886 it was made obligatory; in 1887 it was dropped altogether; in 1890 it was restored as an optional subject for boys in infant schools or classes; in 1893 it was promoted to be an obligatory subject for boys in schools for older scholars, but always with a notice that the grant would be made by the Science and Art Department and upon examinations conducted by that department. It was at length finally taken to itself by the Education Department in 1898, the grants thenceforth being made by the Education Department, and the rules applicable being transferred from the South Kensington Directory to the Whitehall Code. No other department of art has eo nomine been introduced into the Whitehall Code at all except in so far as anything that may be called art may fall under the head of "manual instruction." In 1892 for the first time separate Codes were issued for day schools and evening schools still called by that name.

In 1893 appears for the first time the phrase "evening

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continuation schools." I do not know, and the learned counsel could not tell us, who invented the expression. It is not to be found in any of the Elementary Education Acts nor in any Act which has been brought under our notice. I gather, however, from two extracts from speeches by Mr. Mundella, given in Murray's Dictionary (1) under the word "continuation," and dated respectively 1887 and 1888, that it was introduced from the educational technology of Germany. They are defined in Murray as "schools in which the education of the elementary school is continued to a more advanced age." By the explanatory memorandum prefixed to the Code for each year after 1892 they are to include schools in which "the principal part of the work will be preparatory to the special studies directed by the Science and Art Department or other forms of secondary or higher education." Elsewhere they are spoken of as designed to provide the means for "those who are leaving the day schools to continue their education at evening schools" and as "one of the most important means for turning to better account than at present the money and time now spent in the day schools" (Code of 1893, Arts. VI. and VII.), which means, I suppose, the money now spent upon and time spent in the day schools. Thenceforth, it is announced, the attendance of persons over twenty-one years of age will be recognised; no limit of age is prescribed; no scholar will be compelled to take the elementary subjects. As to one of the subjects, "The Life and Duties of the Citizen," the Code contains the very reasonable statement that it will be found difficult to teach it except to those older scholars who are in the habit of reading and thinking intelligently about public affairs.

The case finds that a large number of the persons taught at the evening schools in respect of which disallowances have been made were adults. It appears to me, again, to have been perfectly within the competence of the department to lay down the conditions under which it would make

(1) [The full title is "A new English Dictionary on historical principles . . . . edited by Dr. James A. H. Murray, &c." The current short title is "The Oxford English Dictionary."]

grants, and I am not in the least surprised that where it found schools de facto fulfilling those conditions, the grant followed as a matter of course. But to argue, as has been done, that such action on the part of the department sets the school board free to teach at the expense of the ratepayers to adults and to children indiscriminately the higher mathematics, advanced chemistry (both theoretical and practical), political economy, art of a kind wholly beyond anything that can be taught to children, French, German, history, I know not what, appears to me to be the ne plus ultra of extravagance. If the Acts of which the primary object was elementary education and the whole object was education for children are to be transformed into Acts for the higher education—education of a kind usual rather in a college of a university than in a school—of grown-up men and women, it must be done by Act of Parliament and not by a stroke of the pen of a Government department. The department has never affected to do anything of the kind, or to do more than lay down the conditions under which a grant of money may be earned. The extravagance is in the application that has been made by the school board of the successive developments of the Code. The department is under no restrictions as to the conditions under which it shall grant public money, Parliament being at liberty to withhold or ratify the grant. But it is the strangest of arguments to say that, because the department is prepared to grant money for teaching adults to any school in a position to teach them, it follows that a board, created and existing to supply education for children and for no other purpose, has a right to spend money out of the rates for teaching those who are not children. London and the large towns in the country are full of working men's colleges, polytechnic institutions, and other similar establishments, which afford teaching for adults, and to whose legitimate work the provisions of the Code for instruction to adults apply.

An equally extravagant argument has been founded upon the Education Code (1890) Act, 1890. The Code of 1890 had made some new provisions as to special grants to schools in relation to population and some other local circumstances

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which it was obviously apprehended might be ultra vires. These are confirmed by this Act. The Code made no provision that I have been able to find altering the definition of an "elementary school," and in so far as the Act effects that alteration I do not see that it has anything to do with the Code of 1890. It is styled "an Act for the purpose of making operative certain articles in the Education Code, 1890." This description may well perhaps apply to the provision in question, since there would not be more scope for the work of any evening school than for that of a day school without the removal of the restriction in s. 3 of the Act of 1870. Be that as it may, it provides specifically that it shall not be required as a condition of a parliamentary grant to an evening school that a principal part of the education there given shall be elementary, and it is a significant fact that it is silent as to any alteration of the Elementary Education Acts in the way of providing education for adults.

This provision is not an alteration of any regulation of the Code, and it does not touch the question of whether or not a school is conducted in accordance with the conditions required by the minutes of the Education Department to be fulfilled in order to get a grant. The section means just what it says, and no more—namely, that in order to get the grant the school need no longer be confined to teaching principally elementary matter. It is again a general section, not applicable merely to board schools, but to voluntary evening schools, and all others which are in other respects public elementary schools. It does not, in my opinion, alter in the least the powers or duties of school boards, and certainly does not confer an entirely new power to teach adults by the aid of the rates.

Another matter has been urged as being also a statutory recognition of the practice in question. The Local Government Board has directed board schools to shew in their accounts what grants they receive from South Kensington. The Local Government Board has statutory powers to direct in what form accounts shall be kept and returns made, and their orders have to be laid before both Houses of Parliament. Therefore, it is said there is a parliamentary recognition of the fact that school

boards are earning Science and Art Department grants. Such an argument only serves to shew the straits in which the case for the appellants is found. The Local Government Board, like the Education Department, deals with schools as they find them. De facto, they teach this and that which earn grants from South Kensington. Parliament votes the money and the department pays it. It is, therefore, natural that orders should be made that the school board should shew how much it so receives and what is done with it. It is not the business of either department to inquire whether any particular school, voluntary or board, is exceeding its rights with regard either to the public or to individuals by giving the education which has satisfied the conditions and earned the grant. It is, I think, equally futile to say that, because subsidies in respect of the schools and classes objected to in this case have been annually voted by the House of Commons and sanctioned by the Appropriation Acts, the school board must have a right to contribute to the cost of such schools and classes out of the rates. The Appropriation Acts legalize the expenditure of public money in the way proposed. They have absolutely nothing to do with the question whether the school board has exceeded its powers in levying rates to pay for the excess of cost over and above the grants; and, again, I have to say that if the case of the appellants depends upon such an argument it must be in a bad way. In my opinion, therefore, in so far as the expenses in question were incurred for science and art schools and classes or for teaching adults, they are indefensible, and the auditor was right in dealing with them.

We have been asked by both sides to treat the case as if the question of adult instruction had not arisen. I do not know why the respondents joined in the invitation, but it is one which I cannot accept. The question is directly raised by the last clause of paragraph 15 of the case, and it is impossible to ignore it. It is immaterial that it is not one of the reasons given by the auditor, and it is quite impossible to exclude it in dealing with the second question proposed to us. If, as stated in the case, it is really impossible to dissect the items and apportion them between the legitimate objects of the schools and those which

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are ultra vires, his disallowance of the items as a whole must stand. But he has power to reduce as well as to disallow items (order of Local Government Board, July 14, 1880, art. 25), and it seems to me to be little short of absurd to say, as the case does, that the task of apportionment is impossible. Far more difficult tasks of the same nature are habitually performed by judges and juries, and I can see no insuperable obstacle. The question, however, is probably not important. I do not suppose that any one will ever wish that the gentlemen surcharged, who, I do not doubt for a moment, honestly did what they conceived to be their duty, should be mulcted in the amounts surcharged or in any other amounts. There can be no doubt that the importance of the subject demands that the questions raised should be decided by the House of Lords. Until that is done there can hardly be any disturbance of the existing order of things without the most enormous inconvenience. When the question is finally set at rest, if the views I have expressed be maintained, I can see nothing whatever to prevent the appellants from applying to the Local Government Board under the provisions of 11 & 12 Vict. c. 91, s. 4, to remit the surcharges. It will be only when it is finally decided that the surcharges were proper that the occasion will arise for resorting to that section.

Before giving my formal answers to the specific questions which the case presents, I wish to observe that, in respect to expenditure, whether for teaching adults or for maintaining science schools or other teaching, which appears to me to be outside the range of what ought to fall upon the rates, I conceive that under the ample words of s. 13 of the Act of 1873 any school board which can get subscriptions or donations sufficient to enable them to give such instruction is at liberty to do so, provided that it bonâ fide conforms to sub-s. 2 and expends no money out of the rates towards such education. It is true that in the Act of 1870 the school fund is to consist of all moneys received in any manner whatever by the school board, but the provisions of the Act of 1873, s. 13, could not be complied with unless the funds specially allocated, which that Act enabled the school board to accept and administer, were

made the subjects of separate accounts, and to that extent the Act of 1873 clearly modifies the Act of 1870.

As to question 1, therefore, my answer is that it is not within the power of the board to provide at the expense of the ratepayers science and art schools or classes in day schools; that the question of providing science and art schools in evening schools cannot arise, inasmuch as by Art. LVI. of the Directory the work of such a school must be carried on in day classes; that science and art classes in evening continuation schools are as much beyond the scope of rate-aided education as in day schools; but that in both, such educational work may be carried on by the school board provided the whole of the funds required for it are furnished from sources other than contributions from the rates. (2.) Assuming the impossibility of apportioning the items which have been disallowed between legitimate and illegitimate expenditure, the disallowances were properly made. (3.) The rule nisi must be discharged.

KENNEDY J. read the following judgment:—In this case I have had the opportunity of reading the judgment which my brother Wills has just pronounced; and it deals so thoroughly and fully with the historical and general aspects of the very grave and important matters before us, that I may, without preface, approach the particular questions which the Court has to decide.

These questions, as stated in the special case, are three in number; but the real and substantial point of controversy is raised in the second of them, and I shall deal with it first. Is it lawful for the school board to pay out of rates levied under the Elementary Education Acts, as the London School Board has done in the circumstances stated in this special case, expenses incurred in providing and maintaining science and art schools or classes either in day schools or in evening continuation schools?

I will take first the case of day schools. It appears to me that we must chiefly be guided by the enactments of the Elementary Education Act, 1870 (33 & 34 Vict. c. 75). It

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was by that Act that school boards were created. It prescribed their purpose, their powers, and their duties; and I have been unable to find that its provisions, so far as the present issues are concerned, are in any essential point affected either by the later statutes relating to elementary education or by the Technical Instruction Acts of 1889 and 1891 (52 & 53 Vict. c. 76; 54 & 55 Vict. c. 4) or the Local Taxation (Customs and Excise) Act, 1890 (53 & 54 Vict. c. 60). The central purpose of the Elementary Education Act, 1870, is plain and definite —to provide education for children in public elementary schools. The school board, which this Act brings into being, is a piece of administrative machinery whose primary work is to produce within a defined district a sufficiency of such educational provision. "Child" is not defined, as, for the purposes of that Act, it is defined in the Elementary Education Act, 1876 (39 & 40 Vict. c. 79). "Elementary education" is not defined. I infer that Parliament intended both terms to be elastic. "Child" is not to be read as designating a person under fourteen years of age, as it is (see s. 48) in the Education Act, 1876. All that is clear is that it is for the education of persons in statu pupillari that the Act intends to provide. "Elementary education" may mean, and in my opinion it does mean, something more than the efficient elementary instruction in reading, writing, and arithmetic, which, under s. 4 of the Act of 1876, the parent of every child between the ages of five and fourteen is bound to cause that child to receive. This Act gives it neither description nor limit.

Now, let us examine the Act in order to see what the school board is to do. According to s. 5 there is to be provided for every school district a sufficient amount of accommodation in public elementary schools available for all the children resident in such district for whose elementary education efficient and suitable provision (referred to in the Act as "public school accommodation") is not otherwise made. Where there is an insufficiency of such accommodation the school board is entitled (ss. 18, 19), and under s. 10 may be required, to provide and maintain schools. The funds for the attainment of this end are stated in ss. 53 and 54, which give a right of

recourse to the rates. These schools must be public elementary schools. What, then, is meant by a "public elementary school"? We have the answer in ss. 3, 7, and 97. It is, in the first place, a school, or a department of a school, at which elementary education is the principal part of the education there given: by which phrase I understand to be meant the principal part of the education of each of the children who attend the school. Secondly, it is to be a school whose scholars are free from any religious test and from compulsion to attend any religious teaching or religious service or Sunday school, and where any religious observance or instruction to those whose parents desire it is subject to certain conditions. Thirdly, it is to be open to inspection by Her Majesty's inspectors of schools under the Education Department; and, fourthly, we have the important stipulation, in s. 7, sub-s. 4, that "the school shall be conducted in accordance with the conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant." The term "parliamentary grant" is explained by s. 3 to mean a grant made in aid of an elementary school, either annual or otherwise, out of moneys provided by Parliament for the Civil Service, intituled "For Public Education in Great Britain." Sect. 97 provides that the conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant shall be those contained in the minutes of the Education Department in force for the time being. The crucial question in this case, in my view, is this: Does the phrase "public elementary school"—that is, the school which the school board is to provide and maintain—as defined by the Elementary Education Act, 1870, involve or connote any, and, if so, what, limitation upon the character or extent of the secular instruction to be given, so far, at any rate, as regards instruction the cost of which may be defrayed out of the rates under s. 54? Two things, I think, are clear. First, that the education is to be the education of children, and not of adults; secondly, that only the principal part of the education and not the whole of it must be elementary education. Is there any further limitation? In my opinion there

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is. I agree with my brother Wills in thinking that, if the provisions of the Elementary Education Act, 1870, and especially s. 7, sub-s. 4, are duly considered, it was the clear intention of Parliament to place public elementary schools (and it is only such that the board may legally provide and maintain) under the sole administration of the Education Department at Whitehall. I think that the education which might be paid for out of the rates was intended to be education either prescribed or approved by that department as the responsible authority.

The minutes of that department now in force are contained in the Code of 1898. It lays down certain conditions as necessary for the obtaining of a grant. Some subjects—reading, writing, and arithmetic, needlework (for girls), drawing (for boys), and one "class" subject—the Code prescribes as obligatory subjects of instruction, and denotes as "the elementary subjects." Others, less elementary, it authorizes as optional subjects, either "class" or "specific"; and after giving a list of these it adds, in art. 16, that a subject outside the list of "specific" subjects may be substituted for one of these optional subjects, "provided that a graduated scheme for teaching it be submitted to and be approved by the inspector." These, obligatory and optional alike, are grant-earning subjects. But, further, in art. 17, the Code declares that instruction may be given in other secular subjects although they can earn no grant, but they must be subjects approved by the department. So that this Day School Code of 1898 contains a scheme of general secular education for children in a public elementary school, part of which is obligatory and part optional, but all of which is either prescribed by or requires the sanction of the Education Department at Whitehall and is subjected annually to examination by the inspectors who belong to that department. It appears to me that the Elementary Education Act, 1870, when carefully considered and fairly construed, sufficiently shews that it is for the provision and maintenance of a school where the secular instruction does not pass beyond these limitations, that it has given to the school board statutory authority to draw upon the

rates. That which the school board here has done—that which has caused the making of these disallowances and surcharges by the auditor—has been the expenditure of money from this source upon an elaborate system of advanced instruction in science and art which is altogether outside the Day School Code, and in regard to which the Education Department at Whitehall, the director of public elementary education designated, as I read it, by the fundamental statute, has neither responsibility nor control, nor power of maintenance or reward.

The science and art schools and classes are schools and classes organized, governed, and examined by the Science and Art Department at South Kensington. As my brother Wills has fully explained, that department, although at its head, as they are also at the head of the Education Department at Whitehall, are the Lord President of the Council and the Vice-President of the Committee of Council on Education, is really distinct and different from the Education Department. It has a separate staff and organization, separate offices, separate registration of students, separate examinations, and separate inspectors. It administers moneys voted annually by Parliament under a separate head of appropriation for instruction in science and art in the United Kingdom; it has no concern with general public education, or any duty towards public elementary schools. Its Directory (revised to June 1898), which corresponds to the Code of the Education Department, contains in a volume of some 428 pages a statement of the organization of the schools and classes, the subjects of instruction, the admission of students, the methods of inspection and examination, the conditions upon which grants and rewards are given to teachers and students, and a quantity of important detailed information upon other branches of the organization and working of the Science and Art Department. A very short inspection of this volume and of a volume of the Science Examination Papers for 1898, which is also in evidence, suffices to shew the vast difference between the scope, the method, and the character of the general education provided for children by the Code and those of the special education provided by the

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Directory for the science and art students. Art. xviii. of the Directory, I may add, provides that no student may be registered for a grant for attendance under the Department of Science and Art whose name is on the register for day attendance under the English Education Department, subject to the exception that a scholar of an elementary school who has been placed altogether in Standard VII. of the Code may, on personal application, be registered in an evening class with the approval of the department. I feel compelled to hold that the payment by the school board out of rates for the provision and maintenance of science and art schools and classes in day schools is ultra vires.

The position of the school board in regard to evening continuation schools does not appear to me to be in any essential respect different from its position in regard to day schools. Whilst upon the whole I have come to the conclusion that I cannot hold, as we were asked by Lord Robert Cecil, in his clear and able argument, to hold, that a school board cannot legally expend rate-provided money upon instruction in evening continuation schools, I certainly do hold that in providing and maintaining such schools they must not in the matter of instruction go outside the system prescribed or sanctioned and controlled by the Education Department in Whitehall. The Education Department has a Code of regulations for these evening continuation schools which corresponds to the Code of regulations for day schools. The Code in force is that of 1897. It embodies (Appendix I.) many of the regulations of the Day School Code, and amongst others (see No. 77) the regulation that every school must be conducted as a public elementary school. Naturally, and, as one would assume from the title, the curriculum of the Evening Continuation School Code is less elementary, more advanced, and more extensive than that of the Day School Code. It recognises (art. 3) drawing for the purpose of the fixed grant, and seems in the same article to stipulate, as a condition of the grant, inspection in the subject by the Science and Art Department. But, as I understand the provisions of arts. 3 and 130 and Appendix III., and as I understood from an inspection of drawings submitted

to us, the scheme of drawing contemplated by the Code and rewarded by grant from the Education Department is something of a far less advanced character than the scheme of the Science and Art Department in art schools and classes; and in art. 3 it is provided expressly that no scholar may be registered in an evening continuation school for drawing who is receiving instruction in a School of Art or art class under the Science and Art Department, or has been successful in an examination of the Science and Art Department in connection with a School of Art or art class. In regard to science (p. 8) it is prescribed that "any scheme submitted for approval in a science subject which differs from that given for such subject in this schedule must be more elementary than the elementary stage of the subject as shewn in the Directory of the Science and Art Department." It appears to me that the curriculum of education marked out for evening continuation schools as public elementary schools by the Education Department at Whitehall in the Code of 1897 —and it certainly is not wanting in elasticity (see the explanatory note on p. 7)—gives the limits of the instruction in such schools for which the school board is authorized to make provision out of funds obtained by the rates, and that to go outside these limits and provide out of the rates in such schools science and art schools or classes, not under the Education Department, but under the Science and Art Department, and not included in the Code of the Education Department, is ultra vires.

In coming to this conclusion I have not lost sight of the Education Code (1890) Act, 1890 (53 & 54 Vict. c. 22), s. 1, which enacts in substance that for the parliamentary grant to an evening school it should not be necessary that elementary education should be the principal part of the education there given, and to that extent, and for the purpose of the parliamentary grant, alters, in regard to evening schools, the definition of "elementary school," and therefore of "public elementary school" in the Education Act, 1870. I am unable to see how this enactment entitles the school board to spend the money drawn from the rates on instruction authorized and controlled by a department different from that to which s. 7,

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sub-s. 4, of the Elementary Education Act, 1870, refers when it speaks of a parliamentary grant. The reduction under the Act of 1890 of the quantum of the undefined thing called "elementary education" which was required by the Act of 1870 to constitute a school an "elementary school" does not touch the principle upon which, in my judgment, the propriety of school board expenditure out of the rates is to be ascertained. As appears in the Evening School Continuation Code (Appendix I. p. 57), the evening school must, like the day school, be conducted as a public elementary school. If it were not, it could not legally be provided and maintained by a school board. As it is a public elementary school, the system of instruction in it must, for the reasons which I have felt it my duty to give at length, so far as that instruction is provided by the school board out of the rates, be the system of instruction which is sanctioned and controlled by the Education Department, and not that which is administered by the Science and Art Department at South Kensington.

I ought, I think, before leaving the subject of evening continuation schools, to advert to one matter relating to their administration which was the topic of discussion in the course of the argument of this case. The Code of 1897 (explanatory memorandum, p. vii.) declares that "the attendances of persons over twenty-one years of age will henceforth be recognised." In the special case, paragraph 15, it is stated that "there is no superior limit of age in the evening continuation schools, and a great number of scholars were adults." The special case does not submit to us any question as to the provision and maintenance of science and art schools or classes for adults as distinguished from youthful scholars; and it is, of course, conceivable that all the scholars so instructed in an evening continuation school might be under age. Having regard, however, to the facts stated in the special case, and the importance of the matter, I feel it to be my duty to say that to educate adults in a public elementary school by means of funds taken out of rates under s. 54 of the Education Act, 1870, is in my judgment certainly beyond the legal powers of a school board. However wide an interpretation be given

to the words "child" and "children" in that statute, they plainly do not include "adults." The fact that the Education Department has deemed it right, for the purposes of a grant, to recognise the attendances of adults in an evening continuation school, cannot, as it appears to me, legally justify the action of the school board in applying to the education of adults funds to which an Act of Parliament has given a right of recourse only for the purpose of the education of children.

I have now dealt with the second and the really important question. The first question, which asks our judgment as to the power to the school board, as a statutory authority, to provide science and art schools or classes either in day schools or in evening continuation schools, I may, I think, deal with briefly, for, as I understand the facts which are set forth in the special case, this is an academical and not really a practical question. It is stated in paragraph 29 of the case that the expenses incurred by the board in respect of science and art schools and classes under the Science and Art Department have always considerably exceeded the grants obtained from the Science and Art Department, and the deficiency has always been made good by the board out of the school fund and the rates levied under the Elementary Education Acts. By the first question, as I understand it, having regard to the terms of the second question, it is intended to ask us whether it is within the power of the school board, as a statutory corporation, to provide science and art schools and classes either in day schools or in evening continuation schools in cases where there is no need, in order to defray the cost, to have recourse to the rates levied under the Elementary Education Act. I am, upon the whole, inclined to think that there might be circumstances under which a school board might act as suggested without legal objection. In so saying I have in view the provisions of s. 13 of the Education Act, 1873. It appears to me that there might be a gift to a school board for educational purposes under that section, which would enable a school board legally to provide and maintain by means of it a science or art school or class. That is not the present case.

In answer to the third question, I have only to say that in

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my judgment the rule must be discharged. No distinction in principle between the three disallowances and surcharges was suggested by counsel at the bar, and I do not see how any such distinction could properly be drawn.

Rule discharged.

Solicitors: *Sharpe, Parker, Pritchards, Barham, & Lawford; F. W. Hales; The City Solicitor; C. E. Mortimer.*

A. P. P. K.

1900

Dec. 20.

MYERS AND OTHERS *v.* WASHBROOK.

Will—Construction—Things quæ ipso usu consumuntur—Farming Stock—Gift for Life.

Farming stock and implements of husbandry are not things quæ ipso usu consumuntur, and a bequest of them for life does not confer upon the legatee an absolute interest in them, even though the legatee takes no interest under the will in the farm itself in connection with which they were used.

APPEAL from county court of Barrow-in-Furness.

The plaintiffs Matthew Myers, Margaret Myers, Hannah Myers, and Isaac Myers, and the defendant Martha Washbrook, were all children of Matthew Myers of Backbarrow, in the county of Lancaster, farmer, who died on March 6, 1878, having by his will bequeathed to his wife Mary Myers "all my farming stock, implements of husbandry, and other farming effects in and about my premises at Backbarrow aforesaid, upon these conditions, that she remains hereafter unmarried, and that at the decease of my said wife Mary Myers, or in the event that she again marries, I direct that all moneys and effects whatsoever may then be equally divided amongst my children." The will contained no bequest of the lease of the testator's farm at Backbarrow, nor gift of the residuary real or personal estate, nor any direction that his wife should continue to carry on his farming business. After his death his widow Mary Myers for some time carried on the farming business of the testator, and then sold the farming stock and implements,

and purchased with the proceeds a dwelling-house, No. 6, Derry Street, Barrow.

On May 17, 1899, Mary Myers died, having by her will devised the said dwelling-house, No. 6, Derry Street, to the defendant, whom she appointed executrix of her will.

The plaintiffs brought this action against the defendant, claiming an account of the estates of Matthew Myers and Mary Myers deceased, and a declaration that the dwelling-house, No. 6, Derry Street, was purchased by Mary Myers out of the proceeds of the realized estate of Matthew Myers. The county court judge held that the children of Matthew Myers were entitled to the said house, and directed the house to be sold.

The defendant appealed.

J. H. Stamp, for the appellant. The gift of the farming stock and implements to Mary Myers was an absolute gift. They were in the nature of things quæ ipso usu consumuntur, and which cannot be the subject of a gift for life with limitations over. It is true that in *Groves* v. *Wright* (1) Page Wood V.-C. held that the doctrine relating to consumable things did not apply to a gift of farming stock, and that a bequest by a farmer of his farming stock and residuary personal estate to trustees on trust to allow his wife to have the enjoyment of the same for life, and then to sell and divide the proceeds among his children, conferred upon the wife only a life interest in the farming stock. But there the gift of the stock was in connection with the gift of the residuary personal estate, which would include the testator's interest in the farm itself. And in the later case of *Cockayne* v. *Harrison* (2), where a farmer gave by will all his farming stock and other personal estate at Sneinton (the name of his farm) to his wife for life, Lord Romilly M.R. drew the inference that the gift of the stock was in connection with the gift of the business, although the only gift of the farm and business was under the general term personal estate; and he accordingly held that, the gift of the

(1) (1856) 2 K. & J. 347. (2) (1872) L. R. 13 Eq. 432.

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stock being in connection with the gift of the business, the legatee was bound to keep up the stock, and consequently took only a life interest. In *Breton* v. *Mockett* (1), where the testator gave to his wife all his personal estate, including farming stock and implements, for her life, but declared that she should not be liable for depreciation, Malins V.-C. held that the exemption from liability to make good loss by death or wear and tear shewed an intention to confer an absolute interest. He was no doubt driven to rest his judgment upon that ground because the gift of the stock was coupled with the gift of the other personal estate, including the farm, and consequently but for that exemption would have conferred only a life interest. In the present case the gift of the farming stock and implements was not in connection with any gift of the lease of the farm, for the will was silent both as to the farm itself and also as to the residue of the personal estate.

Le Riche, for the respondent, was not called upon.

KENNEDY J. We do not feel any doubt that the county court judge in this case was right in holding that those who by the will were to take the personal effects of the testator upon the death of the widow were entitled to the house which was bought with the proceeds of those effects. The testator was a farmer, and he bequeathed to his wife all his farming stock, implements of husbandry, and other farming effects at his farm at Backbarrow, upon the condition of her remaining unmarried, with a gift over to his children upon her death or remarriage. I think it must be held that the farming stock and implements were not things quæ ipso usu consumuntur, and that the gift of them for life to the wife did not confer upon her an absolute interest. That was the effect of the decision in *Groves* v. *Wright* (2), and that decision has never been overruled. There Page Wood V.-C. said: "I cannot think that the doctrine relating to things quæ ipso usu consumuntur can have any application to a gift of farming stock. That doctrine applies to a personal use exhausting the subject of gift." And

(1) (1878) 9 Ch. D. 95. (2) 2 K. & J. 347.

in *Breton* v. *Mockett* (1) Malins V.-C. took the same view. But for the fact that the wife was there not to be liable for depreciation of the stock, he would have held that she took only a life interest. From the fact that the testator here was a farmer, we might if necessary infer that he intended the farming business to be carried on, but it is not necessary for our decision to go that length.

DARLING J. I am of the same opinion. The result of the authorities seems to be that the doctrine relating to consumable things does not apply to farming stock. It seems to me that even grain, roots, and other similar things which are in fact consumed by being used as food for cattle, or by being sown in the ground, are not things quæ ipso usu consumuntur within the meaning of that doctrine, for they are consumed with the object of being reproduced. The appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant: *J. R. Hargreaves, for S. H. Jackson, Barrow.*

Solicitors for respondent: *Sims & Sims, for Bradshaw, Barrow.*

(1) 9 Ch. D. 95.

J. F. C.

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Oct. 25;
Nov. 26.

THE GOVERNORS OF ST. THOMAS', ST. BARTHOLOMEW'S, AND BRIDEWELL HOSPITALS *v.* HUDGELL.

Land Tax—Exemption—Hospitals—Land in Occupation of Tenants—38 Geo. 3, c. 5—Land Tax Act, 1797.

Any houses or lands, which on or before March 25, 1693, belonged to any of the hospitals mentioned by name in s. 25 of the Land Tax Act, 1797, are exempt from land tax, whether they form part of or are appurtenant to the sites of the hospitals or not, and whether they are in the occupation of the hospitals themselves or are let on lease to tenants.

TRIAL of action before Wills J. without a jury.

On February 8, 1899, a written demand was made on the plaintiffs for payment of 30*l.* 6*s.* 3*d.*, being for land tax alleged to have been assessed by the commissioners of land tax for the parish of St. Saviour, in the borough of Southwark, in respect of certain property situate in the said parish, and known as Maidstone Buildings. The land upon which Maidstone Buildings stands became, together with the then existing buildings thereon, the property of St. Thomas', St. Bartholomew's, and Bridewell Hospitals in 1622, and the governors of the said hospitals have been in possession and received the rents and profits thereof from that time until now. St. Bartholomew's Hospital was founded by letters patent of King Henry VIII., and the hospitals of St. Thomas and Bridewell were founded by charter and letters patent of King Edward VI. There was no evidence to shew whether the property was assessed to land tax before 1780. From that year down to 1835 the property was let to tenants who always paid land tax in respect thereof. In 1835 the property was in hand and the plaintiffs paid the tax. From 1836 to 1898 the property was again let to tenants who were assessed to and paid land tax. In March, 1898, the plaintiffs resumed occupation of the property and continued in possession down to September, 1899, when it was again let to tenants. The demand note in question was for tax alleged to be payable on January 1, 1899. On January 1, 1900, the

defendant, as tax-collector, threatened to distrain on the property for the land tax so demanded. The plaintiffs then brought this action claiming an injunction to restrain the defendant from putting his threat into execution, and also a declaration that the property was exempt from land tax whether whilst in the occupation of the plaintiffs or whilst in that of their tenants.

Asquith, Q.C., and *H. Tindal Atkinson*, for the plaintiffs. The land in question having belonged to the plaintiff hospitals from before 1693 is, by virtue of the provisions of s. 25 of the Land Tax Act, 1797 (1), 38 Geo. 3, c. 5 (made perpetual by

(1) By the Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 25, it is provided: "That nothing in this Act contained shall extend to charge any college or hall in either of the two Universities of Oxford or Cambridge, or the Colleges of Windsor, Eaton, Winton, or Westminster, or the Corporation of the Governors of the Charity for the Relief of the Poor Widows and Children of Clergymen, or the College of Bromley, or any hospital in England, Wales, or Berwick-upon-Tweed, for or in respect of the sites of the said colleges, halls, or hospitals, or any of the buildings within the walls or limits of the said colleges, halls, or hospitals; . . . . or to charge any of the houses or lands which on or before March 25, 1693, did belong to the sites of any college or hall in England, Wales, or Berwick-upon-Tweed, or to Christ's Hospital, St. Bartholomew, Bridewell, St. Thomas, and Bethlehem Hospitals in the City of London and borough of Southwark, or any of them, or to the said Corporation of the Governors of the Charity for the Relief of the Poor Widows and Children of Clergymen, or the College of Bromley; or shall extend to charge any other hospitals or almshouses in England, Wales, or Berwick-upon-Tweed, for or in respect only of any rents or revenues which on or before the said March 25, 1693, were payable to the said hospitals or almshouses, being to be received and disbursed for the immediate use and relief of the poor of the said hospitals and almshouses only."

Sect. 26: "Provided that no tenants that hold and enjoy any lands or houses by lease or other grant from the said corporation, or any of the said hospitals or almshouses do claim or enjoy any freedom, exemption, or advantage by this Act; but that all the houses and lands which they so hold shall be rated and assessed for so much as they are yearly worth over and above the rents reserved and payable to the said corporation or to the said hospitals or almshouses, to be received and disbursed for the immediate support and relief of the poor of the said hospitals and almshouses."

Sect. 27: "Provided always that nothing in this Act contained shall be construed or taken to discharge any tenant of any of the houses or lands belonging to the said colleges, halls, or hospitals, almshouses or schools, or any of them, who by their leases or other contracts are and do stand obliged to pay and discharge all rates, taxes, and impositions whatsoever

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38 Geo. 3, c. 60, and 42 Geo. 3, c. 116), exempt from land tax, at all events while the land is in the occupation of the hospitals. This was clearly the case under the Land Tax Act, 1692, 4 Will. & M. c. 1, which, by s. 22, not only exempts the sites of all hospitals, but also "any of the houses or lands belonging to Christ's Hospital, St. Bartholomew's, Bridewell, St. Thomas', and Bethlehem Hospital." It was not intended by the language of the Act of 1797 to cut down that exemption, and the fact that in the later Act the words "did belong to the sites of any college or hall" precede the words "or to Christ's Hospital, &c." is immaterial. The object of the Act was not to curtail a privilege which had existed for a hundred years but to enlarge it. Secondly, the exemption equally applies when the land is in the occupation of the hospitals' tenants. It is true that s. 26 of the Act of 1797 provides that no tenants who hold any lands or houses by lease from "any of the said hospitals" shall enjoy any exemption under the Act. But "the said hospitals" there referred to are the unnamed hospitals that are grouped together at the end of s. 25 under the head of "any other hospitals or almshouses." They do not include the plaintiff hospitals. The Act draws a distinction between the two classes of hospitals, those which are and those which are not specially

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but that they and every of them shall be rated and pay all such rates, taxes, and impositions, anything in this Act contained to the contrary notwithstanding."

Sect. 28: "And in case any question hath been or shall be made how far any lands or tenements belonging to any hospital or almshouse, in England, Wales, or Berwick-upon-Tweed not exempted by name out of this Act ought to be assessed and charged to the land tax; be it enacted and declared that the same shall be determined by the said commissioners . . . . whose determination in such case shall be final."

Sect. 29: "Provided always, and it is hereby enacted that all such lands, revenues, or rents belonging to any hospital or almshouse, or settled to any charitable or pious use, as were assessed in the fourth year of the reign of their late Majestys King William and Queen Mary, shall be and are hereby adjudged to be liable to be charged towards the payment of this present aid; and that no other lands, tenements, or hereditaments, revenues or rents whatsoever then belonging to any hospital or almshouse, or settled to any charitable or pious uses as aforesaid shall be charged, taxed, or assessed by virtue of this present Act . . . . anything herein contained to the contrary notwithstanding."

mentioned by name, and it gives a different measure of exemption to the two classes. Sect. 28 expressly deals with the question how far lands "belonging to any hospital . . . . not exempted by name out of this Act" ought to be assessed. And s. 29, which provides that lands, rents, and revenues belonging to hospitals which were assessed in 4 Will. & M. are to be liable under this Act, is in substance a part of s. 28, and refers only to the hospitals not mentioned by name. Therefore it is immaterial to inquire whether the plaintiff hospitals' lands were assessed in 1693, for their lands are not within s. 29. In *Cox* v. *Rabbits* (1) Lord Blackburn draws the distinction between the named and unnamed hospitals. In that case the hospital in question—St. Peter's Hospital—was one of the indefinite class, and therefore it was material there to consider whether the land had been assessed in 1693.

Sir E. Clarke, Q.C., and *Loehnis*, for the defendant. Sect. 29 of the Act of 1797 applies to all hospitals. There is no reason for restricting the meaning of the general words there used. Then, if so, that section must apply to the present case; for, from the fact that the land has been continuously taxed from 1780 downwards, it must be assumed, in the absence of evidence to the contrary, that it has always been so taxed as far back as the first taxing Act, i.e., in 4 Will & M. Therefore, this land is liable to be taxed under s. 29. But it is also taxable under s. 25. The words "belong to" cannot be used in two different senses according to the objects in connection with which they are used. "Belong to . . . . Christ's Hospital," &c., must mean the same thing as "belong to the sites of any college," &c.—that is to say, "form part of." The collocation of the words requires this interpretation. The alteration of the words of the Act of 4 Will. & M. was intentional. It was not made for the first time in 1797, but in 1702 by 1 Anne, St. 2, c. 1, s. 30, and the reason for the alteration was probably the discovery of the large extent of lands which the various hospitals possessed, which required that the exemption should be limited in the interests of the revenue. At any rate, the lands are taxable, under s. 26, in the hands of tenants

(1) (1878) 3 App. Cas. 473.

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to the extent to which the annual value exceeds the rent reserved.

Asquith, Q.C., in reply. The term "assessed," in s. 29, must mean lawfully assessed. And in the face of the language of s. 22 of the Act of 4 Will and M. it is clear that this land could not have been lawfully assessed in 1693. No amount of usage can override the express words of the Act of Parliament.

Nov. 26. WILLS J. Certain lands with buildings on them are the property of St. Thomas', St. Bartholomew's, and Bridewell Hospitals. The lands have been so since the year 1622. From the year 1780 down to the present time, with the exception of the year 1835, they have been under leases to tenants. Down to 1835 the leases always contained covenants by the lessees to pay all rates and taxes. In 1835 the lands were in hand. Since 1835 the covenants have been to pay land tax specifically and all other rates and taxes. During the periods when the lands were on lease the tenants were always assessed to the land tax and paid it. In 1835 the hospitals were assessed and paid. The assessments earlier than 1780 cannot be found. The question is whether the lands in question are now liable to the land tax, and I have been asked by both parties to decide this question with reference to such lands (*a*) when in the occupation of the hospitals; (*b*) when in the occupation of tenants.

The first Land Tax Act was 4 Will. & M. c. 1, and was for a year only. Land Tax Acts were passed every year down to 38 Geo. 3, c. 5, which is the last of the series. Though often called Land Tax Acts, they in reality taxed (1.) personal property, (2.) salaries, (3.) land. In so far as they related to personal property and salaries, they have nothing to do with the present case. That portion of the Act of 38 Geo. 3, c. 5, which relates to the taxation of land was made perpetual by 38 Geo. 3, c. 60, and 42 Geo. 3, c. 116. These Acts made an important change in the scheme which had till then prevailed. The sum to be raised by land tax was made fixed instead of variable and dependent upon the amount raised out of the

specified sum granted by Parliament by the tax upon personal property and salaries. The nature and history of this change are discussed at length in the judgment of the Court of Queen's Bench in *Reg.* v. *Land Tax Commissioners* (1), but they do not affect the questions now under discussion.

The earlier Acts underwent considerable modifications both trivial and important, but, with exceptions merely verbal and scarcely worth noticing, the clauses dealing with exemptions in favour of colleges, hospitals, and other like foundations, crystallised into their present shape in 6 Anne, c. 35. I may notice, in passing, that there are differences, sometimes considerable, in the numeration of the clauses in such copies as are printed with numbered sections, but so far as I have been able to discover they point to differences of arrangement and division into paragraphs, and do not point to differences of substance, and no notice need be taken of them for the purposes of the present discussion.

It is, in my opinion, absolutely necessary, in order to get a clear view of the subject, to begin at the beginning and trace the various changes by which the material provisions arrived at the state in which we have to deal with them.

The first Act, 4 Will. & M. c. 1 (2), began by granting to the Crown a tax of 4*s.* in the pound on the yearly value of every hundred pounds of personal estate, to be paid by every person, body politic or corporate, &c., within England, Wales, and Berwick-upon-Tweed. The yearly value seems to have been assumed to be 6 per cent., as it is said expressly that the amount is 24*s.* per 100*l.* The same tax of 4*s.* in the pound is then imposed upon the emoluments of every public office or employment of profit in England, Wales, &c. Lastly, the same tax is imposed upon the yearly value of all hereditaments of every kind within the same limits to be paid by the holder, whether person, body politic or corporate, guild, mystery, fraternity, brotherhood, corporate or non-corporate. The general scheme of the Act was that the sums assessed should be paid by the tenants in occupation, who were entitled to deduct them from the rents due to the owners; with a

(1) (1853) 2 E. & B. 694.

(2) Edition of 1819.

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proviso (in s. 31) that nothing in the Act should affect "any contract, covenant, or agreement between landlord and tenant or others touching the payment of taxes or assessments." Commissioners were named for putting the Act in force in counties or other specified divisions. Sect. 22, it will be observed, provides that nothing in the Act "shall extend to charge any college or hall in either of the two Universities, or the colleges of Windsor, Eton, Winton, or Westminster, or the Corporation of the Governors of the Charity for the Relief of Poor Widows and Children of Clergymen" (which in this judgment I have abbreviated to the Corporation for Clerical Relief) "or the college of Bromley or any hospital in respect of the sites of the said colleges, halls, or hospitals." So far it relates to the land tax. Then is interpolated an exemption of the masters, fellows, and scholars of any such college or hall, and the masters and ushers of every school in respect of their stipend wages or profits arising from their places or employments in the said universities, colleges, or schools; and then the clause reverts specially to houses and lands, and enacts that the Act shall not extend "to charge any of the houses or lands belonging to Christ's Hospital, St. Bartholomew's, Bridewell, St. Thomas', and Bethlehem Hospital in the City of London or borough of Southwark or any of them" (i.e., of the enumerated bodies), "or the said Corporation for Clerical Relief, or the college of Bromley," nor shall "extend to charge any other hospital or almshouses for or in respect only of any rents or revenues payable to the said hospitals or almshouses being to be received and disbursed for the immediate use and relief of the poor in the said hospitals and almshouses only." The clause is badly drawn. The Corporation for Clerical Relief is put amongst a number of specified colleges —following specified colleges and halls and preceding another specified college and hospitals in general—and the exemption is conferred upon all the institutions named, not in respect of the sites "thereof" (which would include the Corporation for Clerical Relief), but "in respect of the sites of the said colleges, halls, or hospitals" only. I cannot doubt, however, that the intention in this part of the clause was to treat the corporation

on the same footing as the colleges, halls, and hospitals referred to, and to confer the immunity upon the corporation in respect of the site of any building which stood to it in the same relation as the college, hall, or hospital—using the phrase in its physical sense of designating a particular building—stood to the college, hall, or hospital considered, not as a building, but as a body corporate or non-corporate. I think the inaccuracy worth noting, however, as an illustration of what will be made abundantly clear later on, that language has been very badly used in the Acts under consideration. The exemption, therefore, extends to the sites of a number of buildings which either are or can be determined and which belonged to certain specified bodies; also to those of all hospitals in England, &c.; to all lands and houses belonging to any of the named hospitals, or to the Corporation for Clerical Relief, or to the college of Bromley. The latter exemptions seem to be absolute. The final exemption applies to hospitals and almshouses in general, throughout the kingdom, and relieves them from taxation of their lands in so far as the rents and revenues derived from them were dedicated to the use of the poor dwelling in them. Here again the language is unfortunate, inasmuch as the Act charges not the rents and revenues but the land itself, though according to its yearly value, which would include but not necessarily be co-extensive with the amount of the rents and revenues. The proviso, however, in s. 23, appears to clear up the ambiguity by providing that no tenant of any lands or houses held by lease or grant from the said corporation or any of the said hospitals or almshouses shall enjoy any exemption by this Act; but that all the houses and lands which they hold shall be assessed for the difference between the yearly value and the rents payable to the said corporation or to the said hospitals or almshouses to be received and disbursed for the use of the poor in the said hospitals and almshouses. I think it is clear, taking the two sections together, that under the Act of 4 Will. & M. the exemption of the lands belonging to the hospitals now in question was absolute, and that the proviso is meant to attach only to the lands belonging to the Corporation for Clerical Relief and the other (unspecified) hospitals and

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almshouses to which the concluding words of s. 22 refer. The proviso uses the same words as are found at the end of that section, and I cannot think that there was any intention to overrule the exemption specifically granted in s. 22 to all lands belonging to certain specified hospitals. A difficulty is created by the omission of the words "or to the college of Bromley" in the proviso. I have not been informed what was the character of the college of Bromley. At the present time it is, I believe, simply an almshouse; but the limiting words in s. 22, "in respect of any rents, &c.," are clearly confined to the *other* hospitals and almshouses mentioned; and the proviso, as it seems to me, touches them and the Corporation for Clerical Relief, and not the college of Bromley. I have not to decide that question, but it is impossible, whilst striving to ascertain the meaning of s. 23, to pass it by. The general meaning of the proviso seems to be this. If there is any surplus value over and above the rents reserved in lands belonging to the Corporation for Clerical Relief or to the unspecified hospitals or almshouses referred to at the end of s. 22 (and settled to the use of the poor in such hospitals and almshouses), the yearly value of the land really belongs pro tanto to the tenant and not to the owners. The object of the exemption is to benefit the foundations in question and not their tenants. There is, therefore, no reason why, to the extent of the surplus value over and above what goes to the charity, the tenant should not be treated as the owner. To that extent, therefore, let the land be assessed. In the ordinary course of things the tenant pays the tax in the first instance, and deducts it from the rent due to the owner. In this case, however, he is, to the extent provided for, the beneficial owner, and therefore he is not to go further and deduct it from his rent.

The section still leaves a puzzle—why Bromley College gets better measure than the Corporation for Clerical Relief, or than any "other hospital or almshouses." The phrase "other almshouses" implies that some almshouse had already been mentioned. If so, it must have been either the corporation, or the college of Bromley, or both. The college of Bromley, I believe, always was what it is now—an almshouse simply. The Cor-

poration for Clerical Relief is the charity now better known as the Corporation of the Sons of the Clergy. It never was, I believe, either hospital or almshouse; and the way in which it is here mentioned separately from hospitals or almshouses makes this pretty clear. It was founded by Royal charter in 1678, only a few years before the Act of 4 Will. & M., and its general character appears in the report of *Corporation of the Sons of the Clergy and Skinner*. (1) The college of Bromley was likewise founded in the 17th century. The nature of both foundations must have been perfectly well known to the framers of the Taxing Act, and there may have been reasons for giving the college of Bromley special consideration.

Another difficulty might well arise. Amongst the revenues of unspecified hospitals and almshouses there may well have been rents applicable partly to the relief of the poor in such institutions and partly to other purposes. No direct solution of such a case is given by the sections. Probably, however, the proper construction would be that the *land* is not discharged. It is capable of being assessed—but only for the overplus above the portion of the rents dedicated to the pious uses in question. As to the rest the tenant will pay, and will deduct the tax, as in any other case, from his next payment of rent.

I have thus dealt at length with this, the first of the series of Acts which ended with 38 Geo. 3, c. 5, partly because I believe its provisions require to be thoroughly understood in order to appreciate the subsequent legislation, although in my opinion it has not substantially altered the original exemptions, and partly because not long afterwards the assessment under it was made a standard of the exemptions conferred by those Acts.

The Acts from 6 & 7 Will. & M. down to 11 Will. 3 (both inclusive) extend the list of named charities appearing in the latter half of the section to two or three others. But, as they disappear once and for all from amongst the named charities, they need not be further noticed.

The Act of 9 Will. 3, c. 10, introduced a modification into

(1) [1893] 1 Ch. 178.

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the scheme. Up till that time the tax had simply been one of 4*s.* or 4*s.* 4*d.* in the pound upon the land and other subjects of taxation. From and after 9 Will. 3, c. 10, the grant is of a definite sum—in that instance 1,484,015*l.* 1*s.* 11¾*d.*—to be raised out of the same subject of taxation, and a great number of counties and other smaller territorial areas are named, out of which a definite sum fixed by the Act is to be raised. It is stated in the judgment of the Court in *Reg.* v. *Land Tax Commissioners* (1) that the sums so assessed on those several divisions follow the proportions of the produce per area of the original assessment of 4 Will. & M. c. 1. The total sum and the specified apportionments varied from time to time. For instance, by 11 Will. 3, c. 2, the forfeited estates of persons guilty of rebellion in Ireland were granted to the Crown, and the sum to be raised by the taxation came down to 989,965*l.* 19*s.* 6½*d.* But it gradually increased till it reached 2,037,627*l.* 9*s.* ¼*d.*, at which it was fixed by 38 Geo. 3, c. 5.

In this Act of 9 Will. 3, c. 10 (2), what is now s. 27 of 38 Geo. 3, c. 5, first makes its appearance as s. 23. It is as follows: "Provided always, that nothing contained in this Act shall be construed or taken to discharge any tenant of any of the houses or lands belonging to the said colleges, halls, hospitals, almshouses, or schools, or any of them, who by their leases or other contracts are and do stand obliged to pay and discharge all rates, taxes, and impositions whatsoever, but that they and every of them shall be rated and pay all such rates, taxes, and impositions anything in this Act contained to the contrary notwithstanding." It has been argued that under this section whenever a house or land belonging to any college, hall, hospital, almshouse or school, which would under the exempting section be free of land tax, happens to be not in hand, but in the occupation of a tenant who has agreed to pay all rates, taxes, and impositions, it shall cease to enjoy the exemption so far as the tenant is concerned. I do not think so. I do not rely upon the use of the present tense in the section, "who by their leases are and do stand obliged to pay," &c. Whether "are" means "are now," i.e., at the passing of the Act, or "are

(1) 2 E. & B. 694. (2) Edition of 1820.

whenever an assessment is made under the Act," must be determined not merely by the tense used, but by the subject-matter of the clause. If there was no reason to the contrary I should be of opinion that a phrase which had been repeated year after year for nearly a century might well in an Act now rendered perpetual be treated as applicable whenever the occasion should arise, namely, on each assessment. But two or three considerations appear to me to negative such an intention. In the first place it would be a strange piece of legislation which should make the question of whether a piece of land was to contribute or not depend, not upon a state of things then established, but upon a future bargain made at the will of two individuals; for, unless they agreed that the tenant should pay all taxes, the proviso would not operate, and the exemption would undergo no qualification, and inasmuch as, if they excepted the land tax from a general covenant to pay taxes, the owners—the charities—would suffer no loss, it is not in human nature that except from sheer carelessness there should ever be a fresh covenant by the tenant such as would set the proviso at work. The tax-gatherer is generally regarded as hostis humani generis, and neither landlord nor tenant would desire to press upon him a tax which by a stroke of the pen could be avoided. In the next place this does not state the full strength of the position. Theorists, I believe, are in much doubt, and differing views have been expressed, as to the extent to which in the case of such a covenant the burden really falls upon the tenant or the landowner; and probably it is affected by the relative excess or deficiency of supply or demand. But, putting it broadly, I do not think it can be doubted that a landowner, who can say to his tenant "there is no land tax to be paid," is in a better position in the higgle for rent than one whose tenant must pay for it and cannot deduct it from the rent; and there must, I think, be many cases in which the liability of the tenant to pay the tax would amount practically to a repeal of the exemption in favour of the charities. I have come to the conclusion, therefore, that the section was intended to apply to contracts already made when the Act was passed, and not to future arrangements. That was certainly its

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meaning in each of the annual Acts, and it seems reasonable to give it the same construction in the Act when made perpetual.

The exemption was intended to be for the benefit of the colleges or charities only, and so long as it made no difference to them whether the tax were levied or not, and there was a person who had already agreed to run the chance of having to submit to any burden which should be imposed by the Legislature, there was nothing contrary either to the policy of exemption in favour of the colleges and charities indicated, or unjust to the tenant in requiring the tenant to pay the land tax. But for the section the tenant would have been discharged in all cases of exempted lands as well as the owners, for the general provisions by which a tenant paying the tax might deduct it from his rent could not be applied to the exempted lands or lands of the exempted foundations—whichever may be the more correct phrase—without a reductio ad absurdum. There always was in every one of the Acts a general provision that nothing in the Act should alter or interfere with any contract between landlord and tenant touching the payment of taxes; but this of itself would not have effected the purpose of s. 23 of 9 Will. 3, c. 10.

In the next year, in 10 Will. 3, c. 9, an addition first appears to the exempting clause (s. 21), the exemption being defined as applying not only to the "sites of the said colleges, halls, or hospitals," but to "any of the buildings within the walls or limits of the said colleges, halls, or hospitals." It has been argued that this is an extension of the original exemption. It is undoubtedly an extension of the language used; but, for reasons which have been suggested to me by an additional section in a later Act, and which I will explain when I arrive at the proper place for doing so, I have come to the conclusion that they are put in, not to alter the actual incidence of the taxation, but to legalise and remove from the area of controversy a liberal interpretation of the word "sites" which had been adopted in the original assessments.

Very shortly afterwards, in 1 Anne, St. 2, c. 1, s. 30 (1), we find

(1) Edition of 1821.

additional words introduced into the latter half of the exemption clause, namely, "or to charge any of their houses and lands which on or before March 25, 1693, did belong to the sites of any college or hall or to Christ's Hospital, &c.," instead of "or to charge any of the lands belonging to Christ's Hospital, &c." These new words are by no means easy to understand. They create a new exemption in favour of halls, by extending it from the named halls to *all* halls, and whereas the exemption hitherto was limited to the sites of the colleges named and of halls and hospitals in general, together with the buildings within their walls and limits, the exemption in the case of all colleges or halls (but not of hospitals) is extended to "houses or lands which on or before March 25, 1693, did belong to the sites of such colleges or halls." The Corporation for Clerical Relief is clearly intended to be included in the exemption, and must therefore have been looked upon as coming within the somewhat elastic words "colleges, halls, or hospitals." It must, I think, be treated as a hall, as it had, so far as I can learn from the best information I can get as to the nature of the charity, none of the features of either a college or a hospital, even as the hospital was then understood, when its meaning was wider than it is at present. Why March 25, 1693, was fixed upon I do not understand. (1) The first assessment was directed by the Act to be completed within thirty days after March 20, 1692, the year being given in numbers and not in the regnal year. The second assessment would not be completed till a little later than March 25, 1693, and there is no conceivable reason why the second assessment should have been made a standard. It looks, therefore, like a clumsy way of saying, "lands which during the currency of the first assessment belonged to the sites of colleges or halls or to Christ's Hospital, &c." Looking to subsequent legislation, presently to be noticed, I think that the phrase was accepted

(1) [Mr. Clerk has been good enough to point out to me that by s. 3 of 4 Will. & M. c. 1, March 25, 1693, was the date appointed for the first quarterly payment of the tax. This explains the expression in 1 Anne, St. 2, c. 1, s. 30, and shews that I have rightly paraphrased it. I have thought it best to leave the text unaltered and append this note.—A. W.]

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as equivalent to "lands which at the time of the first assessment belonged to colleges, &c., or to Christ's Hospital, &c." The draftsmanship is imperfect and embarrassing in other respects. Lands may be said to belong to a site, and may be said to belong to a hospital or to a corporation. But "belong" does not mean the same thing in each case. It can only belong to a site of a college in the sense of being used along with it though not actually covered by the building, and in that sense only can it be used here. It can only belong to a corporation in the ordinary and primary sense of being in the ownership of the corporation. It may be said to belong to a hospital in either of the two senses, though more naturally in the sense of indicating ownership. In the present case there can, I think, be no doubt that it is used, as regards the hospitals named—the Corporation for Clerical Relief and the college of Bromley—in the sense of ownership, because it occurs in the former Acts in a way which is free from doubt, and it cannot have been intended by the introduction of the new exemption to cut down the old one. The words I have been discussing have at least one effect which is free from doubt. They make it clear that the lands covered by the exemption were those only which, before the date in question, were vested in the bodies named, and that the exemption did not extend to lands acquired after that date.

The views I have expressed receive strong confirmation from two fresh sections, which first made their appearance in 2 & 3 Anne, c. 1, ss. 32, 33. The exempting clause sets right two clerical errors which had crept into the clause in the last Act, reading again "the" instead of "their," and "or" instead of "for" in passages where they were obviously out of place. The new clauses are as follows:—Sect. 32: "And in case any question hath been or shall be made how far any lands or tenements belonging to any hospital or almshouse not excepted by name out of this Act ought to be assessed and charged with the land tax, be it enacted and declared that the same shall be determined by the said commissioners or any three or more of them." Sect. 33: "Provided always and it is hereby enacted that all lands revenues or rents belonging to any

hospital or almshouses as were assessed in the 4th year of the reign of their late Majesties King William and Queen Mary shall be and are hereby adjudged to be liable to be charged towards the payment of this present aid, and that no other lands tenements hereditaments revenues or rents whatsoever belonging to any hospital or almshouses as aforesaid shall be charged taxed or assessed by virtue of this present Act, anything herein contained to the contrary in anywise notwithstanding." The first of these clauses assumes that as to the named hospitals and almshouses no question can arise as to how far any lands or tenements belonging to them ought to be assessed to the land tax—a clear indication, first, that the proviso which immediately follows the exempting clause does not apply to the named "hospitals and almshouses" (which last expression I take to include the college of Bromley), but only to the Corporation for Clerical Relief (which was neither hospital nor almshouse), and to the unnamed hospitals or almshouses; and, secondly, that no such question could arise with regard to lands or tenements belonging to the named hospitals and almshouses, because they—the named hospitals and almshouses—were "excepted out of this Act," having no land to be taxed; and, thirdly, that in respect of the lands of the named hospitals it made no difference whether they were in hand or out on lease. Two years later the word "excepted" was replaced by what is, perhaps, a more accurate phrase, "exempted" (4 & 5 Anne, c. 1, s. 23), and that is the word that has been used ever since. The second of the two new sections renders the assessment made under the first Land Tax Act the standard of the assessment to be made under the 2 & 3 Anne, c. 1, so far as regards the liability to assessment of any lands revenues or rents belonging to any hospital, and provides that all those which were assessed in the fourth year of William and Mary, and none others, should be assessed to the then present aid; and the section has been continued down to and in the Act since made permanent. It is not easy to understand what is meant by "revenues or rents." The only connection in which the words occur before is in respect of their exemption from taxation so far as they were payable to hospitals or almshouses

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and settled to the relief of the poor in the said hospitals, &c., with a proviso that, in so far as the lands out of which they arose were of more value than the rents and revenues themselves, they should be assessed and the tenant should pay. The tax is not on the rents and revenues themselves but on the land, and the drafting of the original Act seems again at fault. But the meaning is pretty clear. In respect of the lands described, if the revenues were before March 25, 1693, settled to charitable uses, the exemption was to be complete, if they were then rack-rented; to the extent that the rents fell short of rack-rents, the tenant was to be assessed.

The proviso in s. 33 cannot, I think, have been intended to cut down any of the exemptions originally conferred and repeated in every subsequent Act, or to destroy the additional words of exemption introduced so lately in 9 Will. 3 and 1 Anne, St. 2, and repeated in the Act in question. Taken literally, they would do so. The difference between rack-rent and actual rent must be a varying quantity, and the rents and revenues which are settled upon a foundation are not, as a rule, settled as to any definite sum. The whole are settled, and it is the whole that are entitled to the exemption, whether that sum be 100*l.* in any particular year or 400*l.* The exemption in favour of the hospital, &c., is complete; it is only the tenant who must pay in respect of the surplus value if he is underrented. The new proviso therefore does not, I think, apply to lands so assessed against the tenants, and the words "revenues and rents" may be disregarded. In all cases except the very rare one of an inadequate rent, when the tax, although said to be charged upon the land, is really a personal rate upon the tenant, if the land be free, the rents and revenues will be free. If the land be taxable the tax will, if the land be let, come out of rents and revenues. In all cases, so far as the owner is concerned, the rents and revenues will be taxed or free according as the land is taxed or free. I think, therefore, that the proviso meant to settle the question whether any particular lands which might at any time thereafter belong to one of the hospitals or almshouses named or unnamed in the exempting section was entitled to exemption by reference to the first

assessment. If they had then been assessed, the conclusion would be that they did not *then* belong to the hospital or almshouse. If they had not then been assessed, it was because they did then belong to the hospital or almshouse, in which case the exemption would be continued. This introduction of the original assessment as the standard of liability to assessment seems to me to point strongly to several conclusions at which I arrived without resorting to this proviso, namely, that the exemption was intended to apply only to lands which in the original assessment were properly exempted; that the Act had been applied as if the bits of land, &c., which more accurately, perhaps, fell within the words added by 9 Will. 3, c. 10, and 1 Anne, St. 2, c. 1, were included in the original exemption; and, lastly, that the phrase "on or before the 25th March, 1693," was treated as the practical equivalent of "at the date of the first assessment," for it cannot be supposed that two differing standards were really intended by the same Act. It is, I think, easy to understand why the clause giving the fixed standard of exemption was inserted. The Acts were annual ones. Consequently, "belonging to" acquired fresh meaning with every new Act, and meant "belonging to at the time when the Act was passed," and without the clause in question perpetual accessions might be taking place to the list of exempted lands. At first, apparently, the inconvenience was not realized, for between 1694 and 1699 two or three new charitable foundations were introduced by name into the exemptions. They were dropped out, no doubt advisedly, in 1699, and in 1703 the clause was added which adopted the first assessment as the standard, and prevented any new exemptions from attaching to lands which should have become the property of the foundations in question after the original assessment.

The view that the exemption is confined to lands belonging to the hospitals at the date when the Act making the tax perpetual was passed was taken by the Court of Exchequer Chamber in *Lord Colchester* v. *Kewney* (1), in which decision no notice was taken of s. 29 of 38 Geo. 3, c. 5. The effect of

(1) (1867) 5 L. R. 2 Ex. 253.

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that section was considered in *Cox* v. *Rabbits* (1), where it was decided that land exempt in 1693 as then being the site of a hospital preserved its exemption after its sale by the hospital.

The annual Acts underwent no further change of any consequence for the present purpose. By 6 Anne, c. 35, Scotland was first brought under the land tax, and in that Act, and in all the subsequent annual Acts, "the two universities" become "the two Universities of Oxford and Cambridge," and "any hospital, &c.," becomes, wherever the phrase occurs, "any hospital, &c., in England, Wales, or Berwick-upon-Tweed." In 9 Anne, c. 1, in the section answering to s. 29 of 38 Geo. 3, c. 5, the words "or settled to any charitable or pious use" first appear, never to disappear. They do not seem either necessary or relevant, and I have searched in vain for anything to explain their introduction. The only other alterations are the substitution of "master" for "minister" in the exemption clause, and of "poor of the said hospital" for "poor in the said hospitals" in both places where the phrase occurs. These changes took place somewhere between 1710 and 1798, but I have not thought it worth while to hunt them down, and they do not affect the present question.

It is argued that upon the facts, so far as they are known, I ought to conclude that the land with which we have now to deal was taxed in the first assessment, and therefore ought still to be taxed. It seems that from 1780 downwards the land has always been taxed. Excepting in 1835, when it was in hand, the land has been under lease with a covenant by the lessee down to 1834 to pay all rates and taxes, and since 1835 to pay the land tax specifically. Since 1780 it has always been taxed, and in 1835 the tax was paid by the hospitals, and in every other year by the tenant. Undoubtedly if nothing else were known the argument would be irresistible. But the case states that it has belonged to the hospital since 1622. It therefore belonged to the hospitals at the date of the first Act, and it is quite incredible that at that time, and under that Act which contained no provision like that of s. 27 of 38 Geo. 3, c. 5, it

(1) 3 App. Cas. 473.

should have been taxed whether in hand or on lease; and it seems to me that a far more probable explanation of the fact that it paid tax from and after 1780 down to 38 Geo. 3 is that when each annual Act passed there was already a covenant which properly brought the property in question under the operation of what is now s. 27, and that it was, I think, erroneously supposed both by the assessors and by the tenant that the section operated after the contracts existing when the Act was made perpetual had run out. The single case of payment in 1835 by the hospitals when the land was in hand can scarcely be said to have any serious weight.

I am, therefore, of opinion that the plaintiffs are right, and are entitled to a declaration that the land in question is not liable to land tax, whether in the hands of the plaintiffs or in those of a tenant, and to the injunction asked for, and I give judgment for the plaintiffs with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Pennington & Son.*
Solicitors for defendant: *Simpson, Palmer & Winder.*

J. F. C.

C. A.
1901
Jan. 15.

[IN THE COURT OF APPEAL.]

UPPERTON *v.* RIDLEY AND ANOTHER.

Police—Pension—Special-duty Allowance—"Annual Pay"—Police Act, 1890 (53 & 54 *Vict. c.* 45), *Sched. I., Rules* 1, 11.

By the Police Act, 1890, a constable who has completed a certain number of years' approved service is entitled to a pension, which is to be calculated on the amount of his "annual pay" at the date of his retirement.

A constable was appointed by the commissioners of police to attend permanently on special duty at the House of Lords. For that special duty, which he discharged for several years up to the time of his retirement, he received the sum of 1*s.* a day in addition to his ordinary pay:—

Held, that the extra remuneration for the special duty formed no part of his "pay" for the purposes of the calculation of his pension.

Judgment of the Queen's Bench Division, [1900] 1 Q. B. 680, affirmed.

APPEAL from a judgment of a Divisional Court, reported [1900] 1 Q. B. 680, on a case stated by the quarter sessions for the county of London.

1. The appellant joined the metropolitan police force on December 30, 1872, and on January 1, 1899, he had completed not less than twenty-five years' approved service as a police constable. He had previously duly signed an acceptance of the provisions of the Police Act, 1890. He had given all requisite notices of his desire to retire and to receive a pension, and he was entitled as of right by the Police Act, 1890, to retire and receive a pension for life of two-thirds of his annual pay at the date of his retirement. (1)

2. On March 11, 1894, the appellant, having already served for nine years as a police constable at the Houses of Parliament, was selected by the commissioners of police for permanent duty at the House of Lords, and continued to serve in that capacity until his retirement.

3. The duties which the appellant had to perform at the House of Lords were to preserve the peace, to keep order, to

(1) See 53 & 54 Vict. c. 45, s. 1, and Sched. I., r. 1 (*c*), and r. 11.

protect the person and property of the High Court of Parliament and of persons resorting thereto, to attend fire drill and protect the premises from fire, and generally to act as a police constable in pursuance of his oath and under the orders of the commissioners.

4. From March 11, 1894, down to January 2, 1899, the appellant was paid every week the sum of 39*s*., which was made up as follows: 32*s*., being the ordinary pay of a constable of his rank and service, and an additional sum of 7*s*. in respect of the special duty upon which he was employed.

5. It was stated in evidence by Mr. C. L. Bathurst, chief clerk to the commissioners of police, that the commissioners were under no obligation to pay the appellant the additional sum of 7*s*. even while he remained on special service, though that is done partly as a recognition of the good conduct for which a constable is placed on special service, and partly because by being withdrawn from ordinary duty he loses to some extent his chance of promotion. Although the entire cost of the police employed on special service is paid out of moneys provided by Parliament in each year, and in calculating the amount so provided an allowance of 7*s*. is made over and above the ordinary pay of a constable, the commissioners might, in the opinion of Mr. Bathurst, instead of handing it over to the constables employed, order it to be paid into the pension fund under s. 16, sub-s. 3, of the Police Act, 1890; but of this we had no evidence one way or the other.

6. From the said sum of 32*s*. the sum of 7*d*. was deducted as a contribution towards the pension fund in accordance with s. 15 of the Police Act, 1890. The sum of 7*s*. was paid without any deduction for pension being made therefrom. The appellant signed the weekly pay-list, which contained one column headed "Amount of Pay," and another column headed "Allowance for Special Duties." The sum of 32*s*. appears therein in the former column, and the sum of 7*s*. in the latter, along with allowances in lieu of coals and in lieu of boots.

7. By s. 15 of the Police Act, 1890, the police authority of every police force is directed to deduct from the pay of every constable such stoppages during sickness as may be provided

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by the regulations respecting the force. In the metropolitan police force during absence owing to sickness 1*s.* per diem is usually stopped from the ordinary pay of a constable, and in the case of a constable employed as the appellant was on special duty, and receiving a special allowance in respect thereof, that allowance is usually stopped in addition to the stoppage of 1*s.* per diem from his ordinary pay. During the period of his absence the amount of the allowance would be paid to the constable who actually performed the special duty.

8. A good-service allowance of 25*l.* per annum is granted to each of the eight senior superintendents of the metropolitan police force, and this allowance is taken into account in the calculation of pension.

9. Upon the appellant's retirement the respondents awarded him a pension of 55*l.* 9*s.* 4*d.* a year, which is at the rate of fifty-two times the sum of 1*l.* 1*s.* 4*d.*, the sum of 1*l.* 1*s.* 4*d.* being two-thirds of the above-mentioned sum of 1*l.* 12*s.*

An appeal to the court of quarter sessions (1) was dismissed subject to a case for the opinion of the High Court.

The questions for the opinion of the Court were:—

1. Whether the sum of 7*s.*, though called an allowance, was "pay" within the meaning of the Police Act, 1890, and as such ought to have been taken into consideration in arriving at the amount of the pension due to the appellant.

2. Whether "annual pay" means fifty-two times the weekly pay, or 365 times the daily pay.

The learned judges differed in opinion on the first question, and the decision of the quarter sessions was affirmed on that point, but reversed on the second point. (2)

The appellant appealed from the decision of the Queen's Bench Division on the first question raised by the case. There was no appeal on the second question.

Pickersgill, for the appellant. By the Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 12, the salaries, wages, and allowances of persons belonging to the police force are to be those that the Secretary of State shall direct. By the Metro-

(1) Under 53 & 54 Vict. c. 45, s. 11 (*b*). (2) [1900] 1 Q. B. 680.

politan Police Act, 1839 (2 & 3 Vict. c. 47), s. 22, a police superannuation fund was established by deductions from the pay of every constable. The word "pay" is inclusive of "salaries, wages, and allowances" mentioned in the earlier Act, and the same meaning should be attached to the word "pay" in the Act of 1890. The mere fact that the practice has been not to make deductions from extra allowances cannot affect the statutory rights of the appellant. The amount of pension depends on rule 11 of Sched. I. of the Police Act, 1890, which says that it is to be calculated according to the amount of the annual pay of the constable at the date of his retirement. The extra emoluments are not the less "pay" because they are given in respect of special duty, especially as that duty is described in the case as permanent. The position with regard to this extra pay is the same as if a fresh contract had been made when the appellant was appointed to his new duty.

Macmorran, Q.C. (with him *J. P. Grain*), for the respondent. The pay of a constable is the amount that the Secretary of State directs that he is to receive. The whole of the dealings with this extra sum shew that it is treated as on a different footing from the pay of the constable. In fact it is an allowance, and is similar to a money allowance which may be given for coals and boots, but could not be treated as part of the pay of the recipient.

A. L. SMITH M.R. The question that arises in this case is what is the meaning of the words "annual pay" in the Police Act, 1890, because on the amount of the annual pay of a police constable depends the amount of the pension to which he is entitled. It is necessary to look at the document which the police constable signed when he entered the force to see the terms under which he came with regard to pay. That document has been handed up to us, and it is clear, from the scale of pay sanctioned by the Secretary of State and set out in the document, that Upperton agreed to become a constable on the terms that his pay while he was in the third class should be 24*s.* a week, if he were advanced to the second class the pay should be 27*s.* a week, and if to the last, 30*s.* a week. This

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latter sum has been recently advanced by order of the Secretary of State, who is the proper authority in such matters, to 32*s*. It seems to me that if the constable did not receive the pay set out in the document that I have mentioned, he would be entitled to recover by petition of right the amount for which he had contracted to serve, and which the authorities were bound to pay him. I asked in the course of the case where there was to be found any contract under which the constable was entitled to sue for and recover any sums over and above those set out in the document. No such contract was pointed out, and I can find nothing which would entitle the constable to recover anything beyond the sums specified in the contract under which he serves. The case does not rest there, for paragraph 5 of the special case shews that the police commissioners were under no obligation to pay to the appellant the additional 7*s*. a week while he was on special service, but that the payment was made partly as a recognition of good conduct and partly because, by being withdrawn from ordinary duty, the appellant to some extent lost his chance of promotion. I have said that it has not been shewn that the 7*s*. was a part of the appellant's ordinary pay, and in my opinion paragraph 5 shews the contrary to be the fact.

There is another fact which has some bearing on the matter. It appears that it has been the practice for many years not to treat such a sum as the 7*s*. a week, which the appellant received for special duty, as pay from which a deduction should be made towards the pension fund established by s. 16 of the Act. For these reasons I am of opinion that the sums paid for special duty were not part of the annual pay of the appellant; and in this I agree with the judgment of my brother Channell, confirming the decision of the court of quarter sessions. The appeal must therefore be dismissed.

COLLINS L.J. I am of the same opinion. The right of the appellant to a pension depends on the terms of the Police Act, 1890, and the pension is to bear a certain proportion to the annual pay of the constable at the date of his retirement. The person who alone can determine what amount of pay a con-

stable is to receive is, by 10 Geo. 4, c. 44, s. 12, which does not seem to have been altered, a Secretary of State. The only evidence that we can act on is the scale of fees approved by a Secretary of State to be found in the paper which the constable signed on joining the force. In that paper we have on the highest authority that the pay is that which appears on the face of the document. In the present case there was an appeal to quarter sessions from the decision of the Secretary of State, not on a matter of discretion or on any question of a maximum or minimum allowance, but in fact on a matter which involves a decision by the Secretary of State as to what was the pay of this constable, so that the evidence of what the Secretary of State has declared on the document signed by the constable to be his pay, the amount awarded as pension to the appellant, and the whole practice for many years with regard to the stoppage of the special service allowance during absence from the special work and the deductions for a pension fund, point in the same direction and shew that this extra allowance which the constable received cannot be brought within the term "annual pay."

ROMER L.J. concurred.

Appeal dismissed.

Solicitors for appellant: *Mann & Crimp.*
Solicitors for respondent: *Wontner & Sons.*

A. M.

1900
Dec. 17, 18.

HANSON *v.* WALLER.

Master and Servant—False Imprisonment—Evidence of Implied Authority—Manager of Public-house.

The plaintiff was head barman and cellarman in a public-house of which the defendant was owner; the defendant took no part in the management of the house, though he visited it nearly every day, the manager on behalf of the defendant being one M., who had the general management of the house. While the plaintiff was superintending the operation of bringing mineral waters into the cellar, the manager, acting under the mistaken impression that whisky was being removed from the cellar, sent for a policeman and gave the plaintiff into custody on a charge of stealing whisky. Before reaching the police station the manager admitted that he had made a mistake, and on arrival at the police station the plaintiff was released by the inspector. In an action for false imprisonment:—

Held, that there was no evidence that the manager had an implied authority from the defendant to give the plaintiff into custody, the act not being reasonably necessary for the protection of his master's property, and that the defendant was therefore not liable.

Appeal from the deputy judge of the Marylebone County Court.

The action was brought to recover damages for false imprisonment under the following circumstances.

The defendant, who was said to be a chromo-lithographer, was the owner of a public-house; he did not manage it, but came there nearly every day, the manager being one Moseley, who had the general management of the house; the plaintiff was employed there as head barman and cellarman. On June 16 mineral waters were being delivered into the cellar, and the plaintiff was in the cellar superintending the operation; at the same time a man named Augenio, who had a workshop in the courtyard, was carrying lemon juice up to his cart. Moseley, the manager, thinking that whisky was being removed from the cellar, came into the cellar and said, "I'll let you know what it is to run whisky out of my cellar"; the plaintiff, after protesting that Moseley had made a mistake, went upstairs, and was at once given by Moseley into the custody of two policemen whom he had sent for, one of whom

took the plaintiff, and the other Augenio, to the police station. Just before getting there Moseley came up and said, "It's all right—I've made a mistake"; but the constables took them into the station, where they were released by the inspector. The plaintiff then walked back with Moseley to the public-house, but after working there for a few minutes was dismissed by Moseley, and left. At the trial the objection was taken at the close of the plaintiff's case that there was no implied authority on the part of Moseley to give the plaintiff into custody, and the objection was upheld by the deputy county court judge, who gave judgment for the defendant. The plaintiff appealed.

Stuart Sankey, for the plaintiff. There was evidence of an implied authority on the part of the manager to give the plaintiff into custody. The defendant took no part in the management of the house, but left it to Moseley, who had the entire general management—a fact which distinguishes the case from *Abrahams* v. *Deakin* (1), where the person who committed the tortious act was merely a bar manager, whose authority would necessarily be limited. The authority was necessarily incident to Moseley's position as manager, for he was acting to protect the interests of his master who was absent, and his act was, as he believed, necessary to prevent his master's property from being stolen. It is not correct to say that a servant has no implied authority from his master to give a man into custody if he has other ways of protecting his master's property. [He also cited *Stedman* v. *Baker* (2); *Allen* v. *London and South Western Ry. Co.* (3)]

Lincoln Reed, for the defendant. The judgment was right. From the fact that Moseley had the general management of the business in his hands it is not to be inferred that he had absolute control over it, especially having regard to the fact that the defendant visited the house almost daily. The authority which a servant is presumed to have for the protection of his master's property which is entrusted to his keeping does not necessarily include an authority to take criminal

(1) [1891] 1 Q. B. 516. (2) (1896) 12 Times L. R. 451.
(3) (1870) L. R. 6 Q. B. 65.

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proceedings. The extent of a servant's implied authority can only be to do such acts as are reasonably necessary for the protection of his master's property. The real motive of Moseley's action, as disclosed by the evidence, was not to protect the defendant's property, but to punish the plaintiff. There is no real distiction between the present case and that of *Jones* v. *Duck* (1), which, being a decision of the Court of Appeal, is binding on this Court. [He also cited *Edwards* v. *London and North Western Ry. Co.* (2)]

Stuart Sankey, in reply, cited *Limpus* v. *London General Omnibus Co.* (3); *Moore* v. *Metropolitan Ry. Co.* (4)

KENNEDY J. I am of opinion that the decision of the deputy county court judge was right and should be affirmed. The plaintiff had been arrested, and wrongfully arrested, on a charge of felony, and he brought his action against the defendant because he was the owner of the public-house in which he, the plaintiff, was employed, and because it was by his manager or servant that he was given into custody. There is no dispute as to the facts. At the close of the plaintiff's case the counsel for the defendant submitted that the manager had no implied authority (it is not suggested that he had any express authority) from the defendant to give the plaintiff into custody, and that there were no circumstances in the case which in point of law gave the manager an implied authority, so as to make the defendant responsible for his act. The deputy judge acceded to this contention, and held that he was bound to nonsuit the plaintiff, and, after a very full argument, I have come to the same conclusion.

The law as to false imprisonment has been discussed at length; that law is clear, but its application to the present case is a matter of considerable difficulty. A manager in the position of Moseley is not in the position of a person who is appointed to a particular agency with the necessity of saying whether a person shall be arrested or not, nor of a person who in the course of his business has the duty of deciding such a

(1) *The Times*, March 16, 1900.
(2) (1870) L. R. 5 C. P. 445.
(3) (1862) 1 H. & C. 526.
(4) (1872) L. R. 8 Q. B. 36.

question. The question in these cases must be whether the employer is liable because from the circumstances there is an implied authority in the manager to act as he did; each case must in fact to a great extent depend upon its own circumstances. The present is not a case where the manager had a special sphere of duty like the cases against railway companies, where the act of an official acting under a by-law may involve the arrest of a passenger, nor is it a case where the general nature of his employment involves the necessity of deciding questions as to arrest.

The law has nowhere been stated more clearly than in the unreported case of *Jones* v. *Duck* (1), which was a similar case to the present, and in which an attempt was made to make the defendant liable on the ground of his being the employer of the actual wrong-doer. In that case A. L. Smith L.J. said: "The cases shewed that a servant had an implied authority to give a person into custody, if it was necessary to do so in order to protect the master's property. But that did not apply here, because the master's property was safe before the plaintiff was given into custody. The cases also shewed that a servant might have such an implied authority derived from the exigency of a particular occasion." That decision, which is one of the Court of Appeal and therefore binding upon us, seems to me, if I may say so, to be absolutely correct; the law is not new, but it is concisely and clearly expressed. Then in *Bank of New South Wales* v. *Owston* (2), Sir Montague Smith, in delivering the judgment of the Privy Council, says (3): "In none of the cases referred to did the question of the authority of a manager or agent intrusted with the general conduct of his master's business arise. They were all cases of particular agencies where the agents had been appointed to a special sphere of duty. The result of the decisions in all these cases is that the authority to arrest offenders was only implied where the duties which the officer was employed to discharge could not be efficiently performed for the benefit of his employer, unless he had the power to apprehend offenders promptly on the spot;

(1) *The Times*, March 16, 1900. (2) (1879) 4 App. Cas. 270.
(3) 4 App. Cas. at p. 288.

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though it was suggested that possibly a like authority might be implied in the supposed cases of a servant in charge of his master's property arresting a man who he had reason to believe was attempting to steal, or had actually stolen it. In the latter of these cases it is part of the supposition that the property might be got back by the arrest, but in such a case the time, place, and opportunity of consulting the employer before acting would be material circumstances to be considered in determining the question of authority." The decision in that case was expressly adopted by Lord Esher M.R. in *Abrahams* v. *Deakin*. (1) In *Stedman* v. *Baker* (2) the question was again considered, and the law was laid down in almost the same terms as in *Abrahams* v. *Deakin*. (1) In *Jones* v. *Duck* (3), to which I have already referred, A. L. Smith L.J. was of opinion that upon the decided cases a master would be liable for the act of his servant on the ground of implied authority, if the giving into custody was an act necessary to protect the master's property. Assuming that to be the law, was the evidence given for the plaintiff sufficient, if uncontradicted, to justify an inference that the defendant had clothed him with an implied authority? I am of opinion that it was not. Moseley was merely the manager of a public-house; it was not within the sphere of his duty to arrest people, or to decide as to their arrest. Were there any circumstances which, within the concluding passage that I have read from the judgment of the Privy Council, would give him an implied authority? Was there an exigency on this particular occasion? There was no evidence that any whisky had gone, or that any of it was in such a position that it could be deemed to be property which might be saved if a prompt arrest were made. There were no circumstances to justify a supposition that the master's property could only be protected by the extraordinary step of an arrest. We must consider, as was pointed out in *Bank of New South Wales* v. *Owston* (4), whether the manager had any opportunity of consulting his superior; it is in evidence that the defendant came to the house almost daily, and there seem

(1) [1891] 1 Q. B. 516.
(2) 12 Times L. R. 451.
(3) *The Times*, March 16, 1900.
(4) 4 App. Cas. 270.

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to be no circumstances of time or place which made it reasonably necessary to take the extraordinary step that the manager took. I do not attribute much weight to the language which the manager is said to have used. Upon the whole, I am of opinion that there was no evidence which could properly be submitted to a jury, and that the judgment of the deputy county court judge was right and should be affirmed.

DARLING J. I am of the same opinion. It is perfectly settled law that a servant of a master who is carrying on a trade may in certain circumstances have authority to order the arrest of a man who has stolen his master's property. It does not follow that he has that authority in every case, and regard must be paid to the language of Sir Montague Smith in *Bank of New South Wales* v. *Owston* (1), where he says that "the time, place, and opportunity of consulting the employer before acting would be material circumstances to be considered in determining the question of authority." Here the employer was not altogether absent; he came down not infrequently to the house, and there can be no question of protecting or getting back his property which would justify the servant in acting in his master's absence. Unless there was evidence in this particular case that the manager's act was necessary for the protection of the master's property, there was no evidence of implied authority to go to the jury. I think that there was no such evidence, and that the decision of the deputy county court judge was right.

Appeal dismissed. Leave to appeal refused.

Solicitors for plaintiff: *Baker & Francis.*
Solicitors for defendant: *Gibson, Usher & Co.*

(1) 4 App. Cas. 270.

W. J. B.

C. A.
1901
Jan. 21, 22.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* SOWTER.

Ecclesiastical Law—Churchwarden, Admission of—Archdeacon, Duty of—Triennial Visitation of Bishop—Power of Bishop to Inhibit—Ministerial Act.

Where an archdeacon was inhibited during the period of the bishop's triennial visitation from exercising any spiritual or ecclesiastical jurisdiction concerning, among other things, the admission of churchwardens :—

Held (reversing the order of a Divisional Court), that it was not the duty of the archdeacon during the period covered by the inhibition to admit a churchwarden, and therefore he could not be ordered by mandamus to do so.

Rex v. *Simpson*, (Mich. 11 Geo. 1) 1 Str. 609, discussed.

APPEAL from the order of a Divisional Court, making absolute a rule nisi for a mandamus directed to the Archdeacon of Dorset as after mentioned. (1)

At an election of churchwardens for the parish of Winterborne Came, in the archdeaconry of Dorset, held on April 23, 1900, there were two candidates for the office of parishioners' churchwarden, namely Samuel Vine, the prosecutor, and John Stevens Passmore, and a poll was demanded. The poll was held on May 7, when it appeared that the two candidates received an equal number of votes, the rector of the parish, who presided at the poll, voting as a ratepayer in favour of Vine. The rector thereupon gave a casting vote in favour of Vine, and declared him to be duly elected. Both parties claimed to be elected, and, it being the year of the triennial visitation by the Bishop of Salisbury, both applied to him for admission to the office of churchwarden. The bishop upon June 21 decided in favour of Passmore, and admitted him to the office. On July 13 an application was made by the prosecutor to the archdeacon for admission to the office of churchwarden, but the archdeacon refused to admit him on the ground that on May 29 he, the archdeacon, had been served with an inhibition from the bishop, dated May 28,

(1) Ante, p. 66.

whereby he was inhibited for the space of three months from the date thereof from exercising in his archdeaconry "any spiritual or ecclesiastical jurisdiction concerning the visitation of the clergy, the admission of the churchwardens, the receiving of presentments, and the doing of any other act, matter, or thing appertaining to the visitation of a bishop," unless the inhibition should be sooner relaxed, and that the inhibition was still in force. Upon July 24 a rule nisi was obtained for a mandamus to the archdeacon to admit the prosecutor to the office of churchwarden, the rule being returnable on August 4. On November 17 the Divisional Court (Lord Alverstone C.J. and Kennedy J.) made the rule absolute.

Dibdin, for the archdeacon. It is submitted, with all deference to the Divisional Court, that their judgment does not deal with the exact point really involved in the case. The question is not, as the Divisional Court seem to have supposed, whether, assuming the archdeacon to have had jurisdiction to admit to the office of churchwarden, the bishop, having a jurisdiction superior to that of the archdeacon, had jurisdiction to inhibit him from exercising his jurisdiction to admit. The question is whether or not, during the period of the bishop's triennial visitation, the jurisdiction of the archdeacon is suspended; for, if so, a mandamus to admit cannot lie to the archdeacon during that period. The judgment of the Court below was based upon the authority of the case of *Rex* v. *Simpson* (1) as reported in Strange's Reports, which shews that they were not dealing with the real point; for in that case no question arose as to the effect of the bishop's visitation in suspending the jurisdiction of the archdeacon. The point decided in that case seems to have been that, in a case where the archdeacon had jurisdiction, the bishop had no power by a superior jurisdiction to inhibit him from admitting a particular person, the act of admission being ministerial only. The question whether the duty of the archdeacon is ministerial only has no bearing on the question whether that duty existed during the visitation of the

(1) 1 Str. 609; 2 Ld. Raym. 1379; 8 Mod. 325.

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bishop. It may be admitted that the duty of admitting a churchwarden is ministerial, but the question is as to who was the proper person to perform it. Churchwardens are required by law to present themselves to be admitted at the next visitation after their election, which shall be held either by the bishop, archdeacon, or other ordinary: Cripps' Law of Church and Clergy, 6th ed. p. 181. The question is as to who was the right ordinary to admit in the present case. The case of *Rex* v. *Harris* (1) was relied on by the Lord Chief Justice, but that case, like the case of *Rex* v. *Simpson* (2), has no bearing on the question whether it was the duty of the archdeacon to admit to the office of churchwarden during the bishop's visitation. It proceeded on the ground that, where it is a person's duty to admit, the duty is ministerial only, and therefore it was not a good return by such a person to a mandamus that there was litigation pending before him as to whether the person claiming to be admitted was rightly elected. It has been said that by long custom the archdeacon has acquired powers independent of the bishop in certain matters, as in the case of induction, which is regarded as an act of a temporal nature and cognizable only in the temporal court: see Phillimore's Ecclesiastical Law, 2nd ed. p. 361; but there is no authority which shews that this is the case with regard to the admission of churchwardens. It is stated in *Lunne* v. *Dodson* (3) that, when an archbishop visits, he inhibits the bishop, and, when a bishop visits, he inhibits the archdeacon, and the reason given is that it is to prevent scandal and distraction. The form of inhibition used in the present case is that commonly in use. The bishop's and archdeacon's jurisdictions in the matter are not therefore concurrent. During the bishop's triennial visitation all inferior jurisdictions are inhibited, and the jurisdiction of the bishop supersedes that of the archdeacon, so far as all ecclesiastical matters appertaining to the visitation are concerned: see Phillimore's Ecclesiastical Law, 2nd ed. pp. 1045–1050; *Reg.* v. *Thorogood*. (4) The bishop's power to inhibit applies to all acts appertaining to visitation by the inferior officer, including

(1) (1763) 3 Burr. 1420.
(2) 1 Str. 609.
(3) (Pasch. 13 Car. 1) 3 Salk. 201.
(4) (1840) 12 A. & E. 183.

ministerial acts. [He also cited Godolphin's Abridgment of Ecclesiastical Law, ed. 1687, Appendix, p. 7 (25); *R.* v. *Ward* (1); Gilson's Codex, 2nd ed. vol. ii. p. 958; Lyndwood, Lib. 1, Tit. 10, p. 49 (z); Burn's Ecclesiastical Law, 9th ed. vol. i. Tit. Churchwardens, pp. 405, 406, vol. iv. Tit. Visitation, p. 23.]

Edwardes Jones, for the prosecutor. The judgment of the Court below dealt rightly with the question involved in the present case. They decided the case on the authority of *Rex* v. *Simpson* (2), which shews that the admission of churchwardens is not a matter of spiritual jurisdiction, but a mere ministerial act, and therefore one which the bishop has no power to inhibit the archdeacon from performing, even during the period of his triennial visitation. It is assumed by the argument for the archdeacon that the jurisdiction of the archdeacon in this respect is an inferior jurisdiction to that of the bishop, and therefore the bishop can inhibit the exercise of it during his visitation. But there is no authority to that effect, and the case of *Rex* v. *Simpson* (2) is to the contrary effect. The inhibition of the bishop only applies to matters in which the archdeacon acts by way of deputation from the bishop, and of such matters the admission of churchwardens is clearly shewn by the decision in *Rex* v. *Simpson* (2) and other authorities not to be one. It is submitted that that case distinctly shews that the jurisdiction of the archdeacon with regard to the admission of churchwardens, though it may originally have been by delegation, is now independent of the bishop. See also Cripps' Law of Church and Clergy, 6th ed. p. 90. That being so, the decision in *Rex* v. *Simpson* (2) involves the conclusion that the bishop cannot at any time inhibit the archdeacon with regard to the duty of performing the merely ministerial act of admitting a churchwarden. It has been recognised by Act of Parliament that the archdeacon has jurisdiction with regard to the admission of churchwardens independently of the bishop. See 4 & 5 Vict. c. 39, s. 28. The statement in *Lunne* v. *Dodson* (3) has no application, if the admission of

(1) (1731) 2 Str. 893. (2) 1 Str. 609.

(3) 3 Salk. 201.

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churchwardens be a temporal matter. [He also cited Burn's Ecclesiastical Law, vol. i. p. 406; Phillimore's Ecclesiastical Law, 2nd ed. p. 1480.]

Dibdin was not called on to reply.

A. L. SMITH M.R. Having heard this case argued very fully, I have come to the conclusion, with all respect for the judgment of the Divisional Court, that it did not dispose of the real point which has to be decided, namely, whether the rule nisi for a mandamus was obtained against the right person. If the duty alleged against the archdeacon was one which, at the date of the rule nisi, he had no power to perform, but which the bishop alone could perform, it is obvious that the rule ought not to have been granted; and that the substantial point, which it was desired to raise in this case, cannot be raised by proceedings for a mandamus against the archdeacon. The facts, so far as material, are these. It appears that there were two candidates for the office of people's churchwarden in the parish of Winterborne Came, named respectively Vine and Passmore. The result of the election was that the former obtained a majority of votes by reason of the incumbent of the parish voting for him. The substantial question, upon which it was desired to obtain a decision, was whether or not the incumbent had a right to vote, as he did, at the election of a people's churchwarden. Vine, having a majority of votes, applied to the archdeacon for admission to the office, and, if it had not been within the period of the bishop's triennial visitation, it is clear that the application to the archdeacon would have been in order. But the archdeacon refused to make the admission, on the ground that it was the year of the bishop's triennial visitation, and that, until August 28, he was inhibited by the bishop from exercising jurisdiction concerning (inter alia) the admission of churchwardens, and therefore he had no jurisdiction in the matter. Thereupon a rule nisi for a mandamus to the archdeacon was applied for and granted on July 24—that is to say, before the period of three months covered by the inhibition had expired, and the rule was made returnable on August 4, which was likewise before the expiration of the same

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period. The sole point which, in my opinion, it becomes material to determine, is whether in this case the rule nisi was rightly granted against the archdeacon; or, in other words, whether or no, during the period covered by the inhibition, i.e., down to August 28, the bishop, and not the archdeacon, was the proper person to admit a churchwarden. No authority has been cited to us which shews that, during the bishop's visitation, the archdeacon has jurisdiction with regard to the admission of churchwardens; and the terms of the inhibition itself, which appears to be a formal document in accordance with the usual practice in relation to the matter, are some evidence to shew that, during the visitation, the archdeacon's jurisdiction is suspended. The counsel for the prosecutor contended that the inhibition is in this respect waste paper, but he really was not able to cite any authority for that contention. On the contrary, the result of the authorities, in my opinion, is that, during the period of the bishop's visitation, the bishop alone has jurisdiction with regard to the admission of churchwardens. As I have said, the real question appears to me to be whether, the rule nisi for a mandamus to the archdeacon having been granted during that period, and during the currency of the inhibition issued by the bishop, the rule was not for a mandamus to the wrong person; and with that point I do not think the judgment of the Divisional Court really deals. It is urged that the duty of admitting a churchwarden is merely ministerial. Assuming that to be so, I do not think it has anything to do with the question in this case, which is whether, at the time when the rule was granted, the duty was that of the archdeacon or the bishop. In my opinion the rule nisi was for a mandamus to the archdeacon to do that which he had then no power to do. In giving judgment Lord Alverstone C.J. said: "It seems to have been hardly disputed that the admission of a churchwarden is a ministerial act, and that an archdeacon has no right to inquire into the validity of the election when the elected person presents himself before him for admission. But the case of *Rex* v. *Simpson* (1) is a direct authority upon the point . . . . I think it is quite impossible to adopt the view

(1) 1 Str. 609.

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that there is a mistake in Strange's report. It has undoubtedly been treated as an authority for the point in many text-books; and, as we are dealing with a temporal office, it seems to me good sense that the mere prohibition by a spiritual authority in such a matter ought not to prevent the person whose duty it is to admit the elected person to the office from admitting him." Those observations appear to me to pass by the real question, which is as to whose duty it was, when the rule was granted, to admit to the office of churchwarden; whether it was the archdeacon's, or the bishop alone had jurisdiction in the matter. On the grounds which I have stated, the rule nisi for a mandamus ought, in my opinion, to have been discharged, as having been granted against the wrong person, and therefore I think this appeal should be allowed.

COLLINS L.J. I am of the same opinion. The point in this case, when it is analyzed, appears to me to be a very simple one. The mistake, if there be one, in the judgment of the Divisional Court seems to me to have arisen from the minds of the judges who formed the Court not having been directed to the real point, namely, whether the mandamus asked for was addressed to the right person, it being addressed to the archdeacon at a time when the bishop's triennial visitation was proceeding. I think it is clear law that, during the period of that visitation, and while the bishop's inhibition continued in force, the jurisdiction, or perhaps it would be more strictly correct to say the ministerial duty, of the archdeacon with regard to admission to the office of churchwarden was suspended, and the power of admitting to that office was vested in the bishop alone. If that be so, then, at the time when the rule nisi was granted, the archdeacon had no duty in the matter, and the mandamus asked for was one addressed to the wrong person. That appears to me to be the sole point in the case. No question arises here as to the exercise of control by a superior over an inferior jurisdiction. It is not a question of the archdeacon's jurisdiction to do a ministerial act being controlled by the bishop's superior jurisdiction. The sole question is, whether the archdeacon's ministerial duty to

admit churchwardens is displaced during the period of the bishop's visitation, and the power of admission is then vested in the bishop alone. The counsel for the archdeacon contended that this is so, and cited as authority for that proposition the case of *Lunne* v. *Dodson*. (1) It seems clear that, at the time when that case was decided, the ecclesiastical law was, and, so far as I can see, has ever since been, considered to be that, when the archbishop visited, the bishop was inhibited from exercising jurisdiction, and, when the bishop visited, the archdeacon was inhibited, the reason given being that it was for the avoidance of scandal and distraction. It appears to be suggested by the counsel for the prosecutor that the archdeacon had some kind of common law jurisdiction in the matter independently of the bishop, by reason of which the bishop had no power to inhibit the archdeacon from exercising that jurisdiction during his visitation, though he might inhibit the archdeacon from exercising spiritual jurisdiction. He was not able to bring forward any authority as a foundation for that contention, except the case of *R.* v. *Simpson* (2) as reported in Strange's Reports, which, if applied as suggested in the present case, appears to go a great deal too far. The prosecutor's counsel suggested that that case went to the root of the matter, and shewed that the bishop's inhibition in respect of the admission of churchwardens during his visitation is waste paper. That would seem to be rather a startling result, having regard to the case in Salkeld and what appears to have been the practice in relation to the matter. I do not, however, think that the decision in *Rex* v. *Simpson* (2) supports, even primâ facie, the contention put forward. That decision does not appear to me to have any bearing on the question whether, during the bishop's visitation, the archdeacon can admit to the office of churchwarden. The case appears to me to have been decided on another ground altogether. The decision is put on the ground that the duty of the archdeacon was ministerial. But that proposition is based on the assumption that the duty was his at the time, and it does not appear that the archdeacon in that case had come under incapacity by

(1) 3 Salk. 201.

(2) 1 Str. 609.

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reason of the bishop's presence. He was treated as a person still charged with the duty of performing the ministerial act, and, that being so, it was held that, being the proper officer to admit the churchwarden, he could not be prevented by an inhibition ad hoc from the bishop from admitting a particular person. The point decided seems to have been that, the bishop having sought to exercise a kind of prohibitory jurisdiction over that of the archdeacon, as of a superior court over an inferior court, he had no right to interfere and to prevent the archdeacon from exercising a jurisdiction which he possessed. The case has no reference to the incompatibility of the archdeacon's jurisdiction subsisting at the same time with that of the bishop upon his visitation. If the case is good law, as to which it is not necessary to give an opinion, I do not think it affects the question now before us, which is whether at the time when the rule was granted the archdeacon was the proper person to perform the ministerial function of admitting to the office of churchwarden. It appears to me that he was not, and therefore the rule ought to be discharged.

ROMER L.J. I agree. The simple question appears to me to be whether the mandamus has not been allowed to issue against the wrong person. On the authorities cited I feel no doubt that, when a bishop is visiting, and during his visitation inhibits the archdeacon, the law is that, during the period covered by the inhibition, in respect of various matters, including the admission of churchwardens, the office or duty of the archdeacon is displaced by that of the bishop, so that the archdeacon temporarily and for that period is not the proper person to admit to the office of churchwarden, and the bishop alone is the proper person to do so. It follows under the circumstances which existed in the present case that, at the time when the rule nisi for a mandamus was applied for, the archdeacon was not the proper officer to admit a person as churchwarden, and therefore could not be ordered by mandamus to do so. This point, which was taken in the Divisional Court, does not for some reason or other appear to have been fully appreciated by that Court, for their judgment

seems to proceed on a point which really does not arise, namely, that, assuming the archdeacon to have been the proper person to admit, he could not refuse to perform his duty in the matter, merely because he had been specially inhibited by the bishop. The judgment is based upon the case of *Rex* v. *Simpson* (1); but that case, when examined, is, I think, quite distinct from the present case and is no authority in favour of the prosecutor. It was a case where the archdeacon apparently was the proper person to perform the duty of admitting, and therefore, assuming that the bishop was wrong in inhibiting him from performance of that duty, a mandamus to perform it would lie against the archdeacon. Here, assuming the bishop to have been wrong as to the person who ought to have been admitted as churchwarden, he was the proper person to set the matter right, and the only person who had power to make the admission at that time; and therefore, if a mandamus was to be issued at all, he was the only person against whom it could be issued. It appears to me that the archdeacon was in law a perfect stranger to the matter, and therefore no application could properly be made for a mandamus directed to him. On these grounds I think that the appeal succeeds.

Appeal allowed.

Solicitors for prosecutor: *Jenkins, Baker & Co.*
Solicitors for archdeacon: *Robins, Hay, Waters & Hay.*

(1) 1 Str. 609.

E. L.

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[IN THE COURT OF APPEAL.]

YSTRADYFODWG AND PONTYPRIDD MAIN SEWERAGE BOARD, APPELLANTS; ASSESSMENT COMMITTEE OF NEWPORT UNION, RESPONDENTS.

Poor-rate—Rateability—Underground Sewers—Sewer covered by Embankment —Payments Received for Use of Sewer—Diminution in Value of Surface.

The exemption of underground sewers from liability to poor-rate is anomalous, and will not be extended. Therefore, in order that a new sewer which is primâ facie rateable may escape from such liability, it must fall strictly within the limits of the authorities by which the exemption was established—that is to say, it must not occupy or affect the surface, and no payment must be made to its owners for the use of it by others.

A sewer authority constructed a sewer for the purpose of conveying the sewage of their district to the sea. Part of this sewer was carried on concrete arches above the surface of the ground, part of it was below the natural surface of the ground, and the rest of it was covered by an embankment. The land upon which the embankment was constructed continued to be assessed for the purposes of the poor-rate as before, no change in the assessment of it having been made by reason of the making of the embankment. The sewer authority received payments annually from other authorities for the use by them of the sewer:—

Held, that the sewer, including the portions of it covered by the embankment and underground, was rateable to the poor-rate.

West Ham v. *London County Council*, [1893] A. C. 562, discussed.

APPEAL from the judgment of a Divisional Court (Channell and Bucknill JJ.) (1) upon a case stated by the quarter sessions for the county of Monmouth on a rating appeal.

The appellants (2) are the governing body of a united drainage district consisting of part of the urban district of Ystradyfodwg and the urban district of Pontypridd, constituted by virtue of a provisional order of the Local Government Board, dated June 4, 1885, and duly confirmed by the Local Government Board's Provisional Orders Confirmation (No. 7)

(1) [1900] 1 Q. B. 365.

(2) The terms "appellants" and "respondents" are used throughout this report to designate the parties who were respectively the appellants and respondents to the appeal before the quarter sessions.

Act, 1885, for the purpose of carrying into effect a system of sewerage for the use of the said urban districts.

Pursuant to the powers vested in them by the said order, the appellants designed and constructed, and have since always maintained, a certain sewage carrier for the use of the said districts, and have erected, maintained, and worked such works, machinery, and plant as were required for conveying the sewage of the districts to the sea. The total length of the sewage carrier is about 17¼ miles, whereof nearly 2½ miles passes through or over land situate in the parish of Rumney, which land (excepting such part as forms part of the foreshore of the Bristol Channel) was, previously to the construction of the sewage carrier, and still is, rated and assessed for the relief of the poor. The construction of the sewage carrier within the said parish is as follows: 182 yards of iron pipes carried on concrete arches above the surface of the ground, 1021 yards of pipes laid below the surface and ordinary level of the ground, 1890 yards carried below the surface of the ground but covered by an artificial embankment of varying height which rises above the level of the adjacent land, and 1246 yards of pipes (hereinafter called the outfall) passing partly over and partly beneath the surface of the foreshore of the Bristol Channel. In connection with the outfall certain works have been erected by the appellants.

For the purpose of obtaining money for making and maintaining the sewage carrier and the necessary works appurtenant thereto, the appellants, in accordance with the provisions of the Public Health Act, 1875, borrowed the sum of 156,000*l.* from the Public Works Loan Commissioners, to be repaid with interest at the rate of 3½ per cent. per annum by equal annual payments extending over thirty years. The proportion of the annual repayment payable in respect of the portion of the sewage carrier situate in the parish of Rumney amounted to the sum of 1210*l.* This sum is raised by means of rates.

Under the Local Government Board's Provisional Orders Confirmation (No. 8) Act, 1896, the appellants obtained powers enabling them with the consent of the Local Government Board to allow the sewers of the council of any county, borough,

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or district to communicate with the sewage carrier vested in the appellants. In pursuance of these powers, and with the consent of the Local Government Board, agreements had previously to the date of the making of the assessment now appealed against been made with the Dinas Powis Urban District Council, the Caerphilly Urban District Council, and the Cardiff Corporation, whereby the sewage of the districts under the control of the said local bodies was to be received in and carried away by the sewage carrier of the appellants upon payment to the appellants by the said local bodies of sums levied upon the respective rateable values of the said districts at the rate of $3\frac{3}{4}d.$, $4d.$, and $3\frac{1}{2}d.$ in the pound per annum respectively. In consequence of receiving these sums from the three said local bodies, the appellants are enabled to raise sufficient money for the purpose of repaying the annual instalments of the money borrowed as aforesaid to make and maintain the sewage carrier and the works, machinery, and plant connected therewith in the parish of Rumney by two precepts at the rate of $2\frac{1}{2}d.$ in the pound in each year upon the Ystradyfodwg and Pontypridd area. The rate in the pound in the last-mentioned area would have to be much increased in order to prevent the appellants incurring loss owing to their yearly expenditure in connection with the sewage carrier if the money received by the rates levied outside the said area as aforesaid, being money paid for the use of the sewage carrier, was not available for use by the appellants.

The appellants were assessed by the respondents in respect of that portion of the sewage carrier with the outfall and appurtenances thereof which is situate in the parish of Rumney in the sum of 800*l.* gross estimated value, and 700*l.* rateable value. The appellants appealed against this assessment.

The appeal was heard and determined by the quarter sessions. It was proved before them that, as far as the parish of Rumney is concerned, the sewage carrier conveys the sewage from distant towns, places, or houses through the parish, and there is no connection to or with the sewage carrier from any lands, houses, or buildings in the parish. It was also proved that the embankment varied in height from eighteen inches to six feet

above the ground through which it passed; that it was covered throughout by a mound of earth which was grazed over except where a footpath runs over the top of the mound and where manholes are placed; that it was not separated by any fence from the adjoining land, and that cattle had full access upon and across it throughout its entire length. It was also proved that the land upon which the embankment lies was previously to its formation assessed and rated to the relief of the poor, and that the said land remained so rated and assessed, no change having been made by reason of the making of the embankment in the rating and assessment.

Upon these facts the quarter sessions found that the portions of the sewage carrier which lay under the surface of the ground or in the embankment were not liable to be rated at all, but that the gross estimated value of the other portions of the sewage carrier in the parish of Rumney was 145*l.* (whereof 40*l.* was the gross estimated value of the outfall and works in connection therewith), and that the rateable value thereof was 105*l.*, and they accordingly allowed the appeal to this extent, subject to a case for the opinion of the Court. The respondents appealed.

The Divisional Court held that the whole of the sewage carrier was rateable, and that the order of quarter sessions was therefore wrong, and should be reversed. (1)

Jan. 14. *Cripps, Q.C.*, and *Boyle, Q.C.*, *Ram, Q.C.*, with them, for the appellants. It has been established by many decisions, of which *Reg.* v. *Metropolitan Board of Works* (2) is one, that sewers generally are not rateable. It is true that this exemption of sewers from rateability originated at a time when the legal doctrine as to what constitutes beneficial occupation for the purpose of rating was different from that which has prevailed in more recent times. It was, however, recognised in the case of *West Ham* v. *London County Council* (3) that, whether the grounds, upon which the non-rateability of sewers was first established, were satisfactory or otherwise, the legal

(1) [1900] 1 Q. B. 365. (2) (1868) L. R. 4 Q. B. 15.
(3) [1893] A. C. 562, at p. 598.

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doctrine on the subject had existed so long that it would be improper to overrule it. The House of Lords, no doubt, drew a distinction in that case between the ordinary case of underground sewers, which have never been held to be rateable, and that of a sewer carried in an embankment erected above the general surface of the adjoining land, which they held not to come within the exemption applicable to underground sewers, and to be rateable. But the ground upon which they so held was that in that case the Metropolitan Board of Works had purchased, and erected the embankment containing the sewer upon, land which was previously rateable, and had thereby adapted for their purposes land which was already occupied and rated, and which, unless the sewer was rateable, would have been withdrawn from rateability, and therefore the case was not like that of the construction of an underground sewer, in which case no rateable hereditament previously existed where the sewer was made. The part of the sewer in the present case, which is laid under the embankment, does not come within the principle upon which the House of Lords held the sewer rateable in the case of *West Ham* v. *London County Council* (1), and does, therefore, come within the exemption generally applicable to sewers and recognised by the House of Lords ; for in the present case it is found that the construction of the sewer has not in any way interfered with the rateability of the land, the surface of which remains assessed at the same amount as before. The distinction upon which the decision in the House of Lords really turned was not between an underground sewer and a sewer carried in an embankment erected above the natural surface, but between a sewer which is substituted for a hereditament previously rateable and one which is not. The decision in *Leicester Corporation* v. *Beaumont Leys* (2) is really not applicable to the present case, for there the land was taken by the authority for the purposes of the sewer. The decision of the House of Lords in *West Ham* v. *London County Council* (1) shews that part of a sewer may be considered separately from the rest for the purpose of rateability. In the case of *Holywell Union Assessment Committee* v. *Halkyn*

(1) [1893] A. C. 562. (2) (1894) 63 L. J. (M.C.) 176.

District Mines Drainage Co. (1) the tunnels and watercourse were occupied for the purposes of private profit in connection with mines, and were not analogous therefore to sanitary sewers. The payments made to the appellants by other sanitary authorities for connection with their sewage carrier are not profits in the sense requisite for the purpose of rendering a sewer rateable. They merely go in reduction of the rate which has to be levied by the appellants in their district. Under s. 27 of the Public Health Act, 1875, a connection with any sewer belonging to a local authority may be made by an adjoining authority under the conditions and upon the terms mentioned in the section.

[They also cited *Metropolitan Board of Works* v. *West Ham Overseers.* (2)]

A. T. Lawrence, Q.C., and *Hugo Young, Q.C.* (*Morton Brown* with them), for the respondents. There are three points of distinction between the sewer here in question and the ordinary kind of sewer to which the exemption from rateability is applicable. First, this sewer is made outside the district of the appellants; secondly, the appellants receive payments from other authorities for the use of it, and therefore derive a profit from the use of land outside their district; and, thirdly, the sewer is partly carried on concrete arches and partly in an embankment above the surface of the ground. The exemption of a local authority in respect of sewers within its district seems to be founded on the notion that the sewers exist for the benefit of the inhabitants of the district and are not really occupied by anybody. But it is otherwise with regard to land used for the construction of sewers by an authority outside its district. There is clearly in such a case a beneficial occupation of the sewer as an independent hereditament by the authority. Still more clearly is there such an occupation where payments are received by the authority for the use of the sewer by other authorities. It is not necessary, in order to constitute a beneficial occupation for the purpose of rateability, that there should be a balance of profit over and above expenditure. The rate which the appellants have to levy is reduced by the amount

(1) [1895] A. C. 117. (2) (1870) L. R. 6 Q. B. 193.

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of the payments received from the other authorities which connect with the sewer. It is not found in the case that the rateable value of the land on which the embankment is erected is not reduced by its existence, but merely that the assessment has not in fact been altered. The judgment of the Court below proceeded on the footing that the value of the land must necessarily be affected, though it might be very slightly, and it is contended that this obviously must be so. It is submitted that, even if that be not so, the whole of the sewer is nevertheless rateable. The judgment of the House of Lords in *West Ham* v. *London County Council* (1) proceeds on the principle that the exemption of sewers from rateability is anomalous, and originated in a view since held to be erroneous with regard to what constitutes beneficial occupation for rating purposes, and that therefore the exemption must not be treated as extending any further than it had been carried by the previous decisions, which related to sewers constructed below the surface. The decision in that case was not based really on the ground that the land on which the sewer was constructed was taken by the Board, having been previously rateable, or on any diminution of the rateable value of the land across which the embankment was constructed, but on the ground that the sewer was a hereditament primâ facie rateable, which had been brought into existence and was occupied by the Board for its purposes, and which, being above the surface, did not come within the exemption established by the decisions: see the observations of Lord Herschell on pp. 599, 600 of the report in the LAW REPORTS. This case is an a fortiori case as compared with *West Ham* v. *London County Council* (1), because in this case there is the element that the appellants receive payments for the use of the sewer, the absence of which was the main ground of the original exemption of sewers from rateability. It is impossible to split up the sewer into portions for the purpose of rating. It is really one entire independent hereditament: see *Leicester Corporation* v. *Beaumont Leys*. (2)

Cripps, Q.C., for the appellants, in reply. Nothing turns on the fact that the sewer is outside the appellants' district. Part

(1) [1893] A. C. 562. (2) 63 L. J. (M.C.) 176.

of the sewer in *Reg.* v. *Metropolitan Board of Works* (1) was outside the district of the Board, and the whole sewer in *West Ham* v. *London County Council* (2) was outside the district of the London County Council. But that fact was not treated as material in either of those cases.

The fact that payments are made to the appellants for the use of the sewer by other authorities does not differentiate this sewer from the ordinary kind of sewer which is not rateable, for that may be the case in relation to any sewer. It merely comes to this—namely, that adjoining authorities are allowed to combine with the appellants in the use and maintenance of the sewer, and the payments made by them are no more profits for this purpose than the sewer rates which the appellants levy in their own district. The same element probably existed in the case of *West Ham* v. *London County Council* (2), but does not seem to have been treated as of any importance.

Different parts of a sewer must necessarily be regarded separately in many cases, as for instance where a sewer passes through different parishes.

Cur. adv. vult.

Jan. 29. ROMER L.J. read the judgment of the Court (A. L. Smith M.R., Collins L.J., and Romer L.J.) as follows:—Since the decision by the House of Lords of the rating cases (2) relied on by the appellants, we think it must be taken that the authorities which decided that certain underground sewers of public bodies were not liable to be rated are not based on sound principle, and are to be regarded as anomalies in rating law. These authorities will certainly not be extended; and, to enable new sewers, which would be primâ facie rateable according to ordinary principles, to escape from liability, it must be shewn by their owners that they fall strictly within the narrow limits of the authorities we are referring to. On examination of the case of *Reg.* v. *Metropolitan Board of Works* (1), which is the leading one of the authorities in question, it will be found that the sewers there held not rateable had the following features:—(1.) They were quite underground, so that the surface under

(1) L. R. 4 Q. B. 15. (2) [1893] A. C. 562.

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which they ran was not occupied or in any way affected by them, and (2.) no payment was made to the owners of the sewers for the use of them by others. We think that all sewers which on general principles are primâ facie rateable, and which are not protected by prior decisions, should be held rateable, unless the two features above mentioned are found to exist in relation to them. With regard to the first feature, it is true that in the case of the *Metropolitan Board of Works* v. *West Ham* (1) it was ruled that for rating purposes no distinction existed between a sewer carried underground and one carried upon an embankment; but, after the decision of the House of Lords above mentioned, and the observations of Lord Herschell L.C., at p. 600 of the report of that decision, we think it can no longer be considered that that ruling is law. With regard to the second feature, it appears to us from the judgment of the Court in the case of *Reg.* v. *Metropolitan Board of Works* (2) that that feature was treated as of great importance. In the judgment of the Court delivered by Lush J., he observes sigificantly that the sewers he was dealing with were not "at present" the subject of a beneficial occupation, and he proceeds to say that "no payment is made to the Board for the use of them." We gather that, if any such payment had been made, the decision would have been the other way. It is true, judging from more recent authorities, that the judgment ought not to have been based on such a distinction as that pointed out; but the appellants here cannot take advantage of that error on the part of the judges who decided the case in order to extend in their favour the ambit of an anomalous case based on no sound principle. And further, we cannot find in any reported case, where sewers have been held not rateable, that it has been proved that payments were being made for the use of those sewers by others, and that this fact has been called to the attention of the Court.

It was suggested by the appellants that by the above-mentioned decision of the House of Lords a principle was laid down that no sewers are rateable where the surface is rated both before and after the sewers are made, and the surface

(1) L. R. 6 Q. B. 193. (2) L. R. 4 Q. B. 15.

assessment remains unaltered. We cannot find that any such principle was there laid down. Lord Herschell L.C., whose reasons for the judgment of the House were concurred in by all the members present, stated at p. 598 of the report why the older cases, which decided that underground sewers were not rateable, were allowed to stand. He, in substance, pointed out that those sewers had for a long period before the decisions in question been deemed free from rateability, and that it would not be just to make them rateable after they had been for so long a period deemed free from rateability: and he further observed that until the sewers in question (which in fact were wholly underground) were made, no rateable subject-matter existed where the sewers were; so that, if the sewers were abandoned, the rateability of the places where they existed would cease. We think it is with reference to these observations that he says at p. 600 that he had already stated the only ground on which the exemption of the sewers generally could, in his judgment, be rested. We can find nothing in his address to justify the assertion that he formulated or stated the principle urged by the appellants.

Having regard to what we have already said, it follows that the sewage carrier in the case now before us ought to be rated, and that the appeal should be dismissed. This carrier is new, and cannot claim an exemption from rateability for a long period. It is to a great extent above or on the surface, and even as to the part not immediately on the surface we cannot say that it is so far below the surface as in no way to affect it. Moreover, in this case we think that the sewage carrier in the parish of Rumney, being one continuous construction, should be dealt with as a whole, and that it would not be right, as to the part below the surface, to dissever the sewer, and to say as to that part that it is to be taken as an independent sewer, and be separately treated for the purpose of rating. In respect of the above matters this sewage carrier does not fall within the protection of the anomalous authorities we have referred to, and on principle it clearly ought to be rated. Moreover, in respect of another matter, it is not within the last-mentioned authorities; for it is stated in the case that the owners, the

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appellants, receive substantial yearly payments from other bodies, namely, from the Dinas Powis Urban District Council, the Caerphilly Urban District Council, and the Cardiff Corporation, for the use of the sewage carrier by those bodies, and the cost of constructing and maintaining the carrier is to a large extent defrayed out of these payments. The appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for appellants: *Wrentmore & Son, for Walter Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for respondents: *Warriner & Co., for Davis, Lloyd & Wilson, Newport, Mon.*

E. L.

1900 *Dec.* 18, 19.
1901 *Jan.* 28.

[IN THE COURT OF APPEAL.]

GREAT NORTHERN RAILWAY COMPANY *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—"Conveyance on Sale"—Sale, what amounts to—Minerals under Railway—Statutory Obligation not to Work—Receipt for Compensation—Undertaking by Mine Owner not to Work—"Right not before in existence"—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 60, *Sched. I.—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 78, 79.

A colliery company, who were the owners of coal under and adjacent to a railway, gave notice to the railway company under s. 78 of the Railways Clauses Consolidation Act, 1845, of their intention to work the coal. The railway company thereupon gave notice to the colliery company under the section that they were willing to make compensation for the coal. The amount of the compensation having been fixed by arbitration, the railway company paid that amount, and the colliery company executed an instrument under seal by which they acknowledged receipt of the amount in satisfaction of all claims by them in respect of the coal, and undertook to leave the coal unworked:—

Held, that the instrument so executed was not chargeable with the ad valorem stamp duty payable upon a "conveyance on sale" under the Stamp Act, 1891.

By A. L. Smith M.R., Collins L.J., and Stirling L.J.: The right of the railway company to have the coal left unworked came into existence when the notices were given under s. 78 of the Railways Clauses Consolidation Act, 1845, and therefore that right was not a "right not before

in existence" within the meaning of s. 60 of the Stamp Act, 1891, at the date of the instrument.

By Collins L.J. and Stirling L.J.: The transaction between the colliery company and the railway company was not a "sale" of property or any interest in property within the meaning of the Stamp Act, 1891.

APPEAL from the judgment of a Divisional Court (Darling and Phillimore JJ.) upon a case stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891. (1)

The question raised by the case was whether a certain instrument was chargeable with the ad valorem stamp duty upon a "conveyance on sale" under the Stamp Act, 1891.

The facts are fully stated in the report of the case in the Court below, and also in the judgment of the Master of the Rolls.

The Divisional Court held that the instrument was not chargeable with the ad valorem duty, and gave judgment for the railway company.

1900. Dec. 18, 19. *The Attorney-General* (*Sir R. B. Finlay, Q.C.*) and *Danckwerts, Q.C.*, for the Crown. The question whether the instrument is chargeable with the ad valorem duty must depend upon whether the transaction between the colliery company and the railway company can be said to be a sale. The title in the schedule to the Stamp Act, 1891, under which the ad valorem duty is charged is "Conveyance or Transfer on Sale"; and, whether the instrument is regarded with reference to s. 54 of the Act, which defines "conveyance on sale," or to s. 60, which relates to the "sale of any annuity or other right not before in existence," or to the title in the schedule "Release or Renunciation of any property, or of any right or interest in any property, upon a sale," in any case there must be a "sale" in order that the ad valorem duty may be chargeable. It is submitted that the transaction with reference to which the instrument in question was executed was a sale. It is not contended that the effect of the transaction under s. 78 of the Railways Clauses Consolidation Act, 1845, is that there is a sale of the coal to

(1) [1899] 2 Q. B. 652.

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the railway company: see *Errington* v. *Metropolitan District Ry. Co.* (1) But, in order that there may be a "sale," it is not necessary that there should be a transfer of tangible property. If a right to support is created, or some right worth money is parted with, for money, that is a sale: see *Great Western Ry. Co.* v. *Inland Revenue Commissioners* (2); *John Foster & Sons* v. *Inland Revenue Commissioners* (3); *Coats* v. *Inland Revenue Commissioners.* (4) If an owner of land paid a sum of money for an easement, such as a right to access of light, or a right of way, over adjoining land, the transaction, by virtue of which that easement was brought into existence, would properly be called a "sale" of an easement; and the instrument, by which the easement was legally created, would properly be called a "conveyance on sale." It would be within s. 54 of the Stamp Act, 1891, as being an instrument whereby an interest in property, namely, an incorporeal hereditament, upon the sale thereof, was transferred to or vested in a purchaser. The instrument in question is a deed, being under seal, and an easement over or interest in property was thereby created in favour of the railway company. As to whether this instrument constitutes a deed, see *Crouch* v. *Crédit Foncier of England* (5); *Reg.* v. *Morton.* (6) The effect, in substance, of the provisions of the Railways Clauses Consolidation Act, 1845, s. 78, is that the railway company, in the events and under the conditions contemplated by the section, are empowered to acquire by purchase from the mine owner a right to have the subjacent minerals left unworked for the support of the railway. At common law, apart from statute, a person, who had made a grant of the surface, could not, in the absence of express stipulation, work the minerals so as to let down the surface; but the effect of ss. 78, 79 of the Railways Clauses Consolidation Act, 1845, is that, an option being given to the company, on receiving notice from the mine owner that he intends to work the minerals under the railway, to buy from him the right to have the minerals left unworked, if the company fail to exercise that

(1) (1881) 19 Ch. D. 559.
(2) [1894] 1 Q. B. 507.
(3) [1894] 1 Q. B. 516.
(4) [1897] 2 Q. B. 423.
(5) (1873) L. R. 8 Q. B. 374, at pp. 382–4.
(6) (1873) L. R. 2 C. C. 22.

option, the mine owner is placed by the Act in a similar position to that of a mine owner where, on a grant of the surface, the right to work the mines so as to let down the surface is reserved by express stipulation: see *Rowbotham* v. *Wilson*. (1) The transaction contemplated by the 78th section, and the right acquired under it, cannot for the present purpose be distinguished in substance from the purchase of a right to support or any other such easement at common law by one landowner from another. No doubt the right contemplated by the section goes beyond the ordinary right of support; for it is an absolute right to have the coal left untouched, and an injunction could be obtained to prevent the mine owner from removing it, whether such removal would cause any damage to the railway or not. But it is submitted that such a right might be purchased by agreement, apart from the statute, and the transaction would properly be called a sale. The only effect of s. 78 of the Railways Clauses Consolidation Act, 1845, is to sanction such a transaction by the company. There are no doubt cases of restrictive covenants which would not run with the land, and could not be construed as grants, but it is submitted that there is no reason why there should not be a grant at common law of the right to support by pillars of coal. Assuming that such a right could not be the subject of grant at common law, it is contended that, the effect of the transaction contemplated by the 78th section being to confer upon the railway company the right in specie to have the coal left untouched in consideration of compensation paid to the mine owner, it is a sale of an interest in property within the Stamp Act, 1891. It may be admitted that a merely executory contract for such a right might not amount to the sale of an equitable interest, although an action for specific performance might be maintainable thereon: see *Inland Revenue Commissioners* v. *Angus* (2); but where the compensation or purchase-money has been paid, and the purport of the instrument is to confer the right at once, it is submitted that the effect is that there is an actual equitable interest in the purchaser: see *In re Casey's Patents*. (3) Compensation such as that provided for

(1) (1860) 8 H. L. C. 348. (2) (1889) 23 Q. B. D. 579.
(3) [1892] 1 Ch. 104.

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by s. 78 is really in the nature of purchase-money on a sale: see *Inland Revenue Commissioners* v. *Glasgow and South Western Ry. Co.* (1) Assuming that the instrument in question is not an actual grant or conveyance of the right, and therefore does not come within the terms of s. 54 of the Act, taken by themselves, it is submitted that it comes within s. 60, which provides that "where upon the sale of any annuity, or other right not before in existence, such annuity or other right is not created by actual grant or conveyance, but is only secured by bond, warrant of attorney, contract, or otherwise, the bond or other instrument, or some one of such instruments, if there be more than one, is to be charged with the same duty as an actual grant or conveyance, and is for the purposes of this Act to be deemed an instrument of conveyance on sale." The ejusdem generis doctrine is not applicable to the construction of the words in this section "other right," for there is no enumeration of a class of rights preceding them. The point of time referred to by the words "not before in existence" is the inception of the transaction of sale of which the instrument in question forms part, i.e., in this case the commencement of the proceedings under s. 78. The proceedings under s. 78, i.e., the notice of intention to work by the mine owner, the counter notice offering to make compensation, and the execution of the instrument in question, must for this purpose all be looked upon as one transaction. The words of the section "not before in existence" cannot be intended to refer merely to the date of the instrument itself, because the word "secured" involves that the right in some sense already exists. The words mean "not in existence before the transaction of sale of which the instrument forms a part." By the instrument here in question a right not in existence before the transaction, i.e., the sale of the right under s. 78, is secured by covenant or contract. If the case comes within s. 60, it is immaterial whether there could be a grant or conveyance of a right such as that contemplated by the statute at common law.

[They also cited *Smith* v. *Great Western Ry. Co.* (2)]

(1) (1887) 12 App. Cas. 315. (2) (1877) 3 App. Cas. 165.

C. A. Russell, Q.C., and *Stamford Hutton*, for the Great Northern Railway Company. The instrument in question is not chargeable with ad valorem duty as claimed by the Crown. It is not an instrument executed "on sale" of any property, or interest in property. It is clearly not a conveyance on sale within s. 54 of the Stamp Act, 1891. The transaction between the parties was not a sale, and the instrument does not transfer any interest in property to the railway company, or vest any such interest in them. There was no sale or conveyance of any right of the colliery company to the railway company. All that happened was that the right of user by the owners of the minerals became restricted as in the case of a restrictive covenant. It is clear that under s. 78 the minerals are not vested in the company: see *Errington* v. *Metropolitan District Ry. Co.* (1) It is alleged that this instrument amounts to a sale of an incorporeal hereditament, namely, the right to have support afforded by the subjacent minerals. Assuming that there could be a "grant" of such a right at law, it could only be made by deed. It is submitted that this instrument is not a deed. It is really only in substance a receipt for the compensation awarded under the Railways Clauses Consolidation Act, 1845. It is no doubt under the seal of the colliery company, but that is merely because, the company being a corporation, the acknowledgment of receipt of the compensation by them required to be under seal. The instrument is not a deed in the sense necessary for the creating of an incorporeal hereditament: see *Brown* v. *Vawser* (2); *Smyth* v. *Latham* (3); *Chanter* v. *Johnson* (4); *In re General Estates Co.* (5); *In re Imperial Land Company of Marseilles.* (6) It is merely an executory agreement, so far as the undertaking not to work the coal is concerned, and itself contemplates the execution of some further instrument for the purpose of completing the right of the railway company. It is not suggested by the Crown that this case comes within s. 59 of the Stamp Act, 1891. A merely executory agreement for a right like this is admittedly not a

(1) 19 Ch. D. 559.
(2) (1804) 4 East, 584.
(3) (1833) 9 Bing. 692, at p. 709.
(4) (1845) 14 M. & W. 408.
(5) (1868) L. R. 3 Ch. 758.
(6) (1870) 11 Eq. 478.

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conveyance of an equitable interest within s. 54 of the Stamp Act: *Inland Revenue Commissioners* v. *Angus*. (1) Sect. 60 of the Stamp Act, 1891, does not apply to such a right as that in question here. Its terms are obviously applicable only to annuities and other similar rights, such as rent-charges. The word "secured" is appropriate to such rights, but is inappropriate to a right such as the right to have the surface of land supported by the subjacent strata. Moreover, no new easement or right was created, or secured, by this instrument, and therefore neither s. 54, nor s. 60, is applicable. The right of the railway company really existed by virtue of the statute before the instrument, and even before the transaction effected under s. 78. It existed by virtue of the Railways Clauses Consolidation Act, 1845, as soon as the railway company purchased the surface. Apart from the statute, upon the conveyance of the surface there would have arisen at law a right to the support afforded by the subjacent strata, in the absence of express stipulation to the contrary. The Railways Clauses Consolidation Act, 1845, modifies and extends the law to some extent with regard to surface land purchased by a railway company for the purposes of a railway; but, except so far as modified by that Act, the rights of the railway company are the same as those of any other grantee of the surface for a particular purpose. The right of the company really arises when the severance of the surface from the minerals takes place. The railway company are upon that severance entitled to the support of the minerals; but, when the mine owner desires in the course of working to work the coal under the railway, and gives notice thereof to the railway company, then, unless the railway company will pay compensation, a right is given to the mine owner by statute to work the coal in the manner described by s. 79, even although the railway may be damaged thereby. There is no question of creating a new right or vesting a new easement in the railway company by virtue of any instrument. The right of the railway company depends on the statute, and arises on the purchase of the

(1) 23 Q. B. D. 579.

surface, subject to the right which may afterwards arise in favour of the mine owner by the operation of the 79th section.

Sir R. B. Finlay, A.-G., in reply.

Cur. adv. vult.

1901. Jan. 28. A. L. SMITH M.R. read the following judgment:—The questions argued in this case in the Divisional Court, and, apparently, before the Commissioners of Inland Revenue, have now come down to one, which is whether an instrument dated December 6, 1898, is covered by s. 60 of the Stamp Act, 1891 (54 & 55 Vict. c. 39), and thereby made liable to an ad valorem stamp duty; and this depends upon the true construction of this 60th section, which is one of the sections in the Stamp Act under the heading "Conveyances on Sale." The section enacts that "where upon the sale of any annuity or other right not before in existence such annuity or other right is not created by actual grant or conveyance, but is only secured by bond, warrant of attorney, covenant, contract, or otherwise, the bond or other instrument . . . . is to be charged with the same duty as an actual grant or conveyance, and is for the purposes of this Act to be deemed an instrument of conveyance on sale." The document sought to be charged with the stamp duty is as follows: "We, the Middleton Estate and Colliery Company, Limited, ... the owners in fee simple, free from incumbrances, of the coal hereinafter described . . . . hereby acknowledge to have received from the Great Northern Railway Company . . . . the sum of 1099*l.*, being the compensation payable to us under the award of Maurice Deacon, dated the 7th June, 1898, for the whole of the Middleton Little Seam of Coal under all that piece or parcel of land situate in the borough of Leeds and under the Hunslet branch of the railway company containing by admeasurement 3 acres or thereabouts and distinguished by blue stripes in the plan hereto annexed, which said coal was required to be left unworked by a notice dated the 16th July, 1897, under the hand of . . . . the secretary of the railway company and addressed to us . . . . and in consideration of

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the said payment of 1099*l.* we hereby undertake and agree to leave entirely unworked the whole of the said coal . . . . and, further, undertake at the cost of the railway company to do and execute or procure to be done and executed all deeds, matters, and things necessary for vesting the same in the railway company whenever thereunto by them required; and we further acknowledge and declare that the said sum includes satisfaction and compensation for all claims which, but for these presents, we might have maintained, either under the provisions of any statute, or at law or in equity, against the railway company in respect of the said coal. Dated this 6th day of December, 1898. The common seal of the Middleton Estate and Colliery Company, Limited, was affixed hereto in the presence of Fairfax Rhodes and W. H. Maude, directors; M. Nicholson, secretary."

It will be seen that, to come within the section, there must be a right not before in existence, and there must be a sale of such right which is secured by bond, contract, or otherwise. Now, assuming, as I will, in favour of the Crown that there was a sale of a right in the present case, was it a sale of a right not before in existence, i.e., of a right not in existence before the date of the contract sought to be charged with stamp duty? Now, when did the right in the present case come into existence?

The facts are these: Prior to July 16, 1897, the Great Northern Railway Company purchased the lands necessary for the construction of its Hunslet branch line of railway, the surface, as also the coal under the said lands, then being, so far as material, the property of a colliery company. By virtue of s. 77 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), although the surface of these lands upon their purchase passed to the railway company, the coal lying thereunder did not pass, but remained the property of the colliery company. Some time after this purchase by the railway company, the colliery company, pursuant to s. 78 of the Act of 1845, gave notice to the railway company that it was desirous of working the coal (which was still its property) in three acres delineated upon a plan. The railway company thereupon on

July 16, 1897, gave notice to the colliery company, pursuant to s. 78 of the Act of 1845, that the working of the coal in the three acres would be likely to cause damage to the works of the railway company, and the notice required the colliery company to refrain from working the coal under the three acres, and stated that the railway company would make compensation to the colliery company for so much of the seam of coal as was within the three-acre area. By agreement between the parties the amount of compensation to be paid was referred to an arbitrator, who awarded that the full compensation payable by the railway company to the colliery company for leaving the coal unworked was the sum of 1099*l*. It will be seen that by s. 78 of the Act of 1845, under which the proceedings above stated were taken, it is enacted that "if the company" (that is, the railway company) "be willing to make compensation for such mines or any part thereof to such owner, lessee, or occupier thereof, then he shall not work or get the same." So that upon compensation made, in this case the payment of the 1099*l*., a statutory right is brought into existence in favour of the railway company.

I will assume in favour of the Crown that this statutory right so far is a right within s. 60 of the Stamp Act, 1891; but the words "not before in existence" have to be dealt with. The point is, Is this statutory right a right not before in existence, i.e., before the date of the contract of sale? When then did this statutory right first come into existence? In my opinion, when the mineral owner had worked up so near to the railway that in the opinion of the railway company further working might do damage to that company and the notices under s. 78 of the Railways Clauses Consolidation Act, 1845, had been given. Then the right of the railway company to stop the further working for ever of the minerals, and the right of the mineral owner to be then paid for his minerals, came into existence; and this is before the date of the contract sought to be charged with stamp duty. This right does not therefore satisfy the requisites of s. 60, for it was in existence before the date of the document sought to be charged. This appeal must therefore be dismissed.

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COLLINS L.J. read the following judgment:—I am of opinion that the decision of the Court below was right in this case. The argument in that Court seems to have turned mainly on the point whether the instrument in question was a release or renunciation upon a sale. But before us the discussion was narrowed, and the counsel for the Crown, as I understood, admitted that, unless the case could be brought within s. 60, they could not make good the claim to the duty which it was sought to impose. Their contention was that there has here been a sale of a right not before in existence secured by the instrument in question. In order to see whether this contention is well founded, it is, of course, necessary to examine s. 60, and to scrutinize the instrument itself. It seems to me that to bring an instrument within this section, which is one of a series dealing with conveyances on sale, there must be—(*a*) a sale of an annuity or other right; (*b*) that right must not be an already existing right, but must take its origin from the transaction of sale itself; (*c*) the right must be one, the sale of which is capable of being completed by grant or conveyance. If these conditions are fulfilled, the instrument or one of the instruments which secure such right by bond, covenant, contract, or otherwise is to be charged with the same duty as an actual grant or conveyance, although there has been no actual grant or conveyance creating the right. If the instrument in question fails to meet any one of these conditions, it is not within the section. Now, the genesis of the instrument is this: Under s. 78 of the Railways Clauses Consolidation Act, 1845, if the owner, lessee, or occupier of mines under or within a certain distance of the railway be desirous of working the same, he is bound to give the company thirty days' notice. The company may then inspect the mines, and, if they think the working is likely to damage the railway and are willing to make compensation for such mines or any part thereof to the owner, &c., he is debarred from working them, and, if the amount of compensation is not agreed upon, it may be settled as in other disputed cases. By s. 79, if the company do not before the expiration of the thirty days state their willingness to treat, the owner may proceed to work the mines in the usual

way. Thus automatically, where the sections apply, as soon as the railway comes into existence, a fetter is placed by statute on the mine owner, who is compelled to give notice and suspend action for thirty days, and, if at the end of that time the company are willing to make compensation, the fetter becomes absolute. In the present case notice was given. The company were willing to make compensation. The amount was ascertained by arbitration and paid, and thereupon the instrument in question was executed by the parties. The Attorney-General admitted that under the above sections no property in the coal is passed to the company on paying compensation: see *Errington* v. *Metropolitan District Ry. Co.* (1), and the Attorney-General declined to take the point that the instrument altered the effect of the statute in this respect.

Does, then, this instrument come within s. 60? I think not. In the first place, the rights of the parties were fully ascertained by statute before the instrument came into existence, and the right which the Attorney-General contends was secured by the instrument existed apart from and before the transaction of sale, if any such transaction is suggested after the statute had thus ascertained the rights. Secondly, there was in point of fact no sale at all. No "property" and no "estate or interest in any property" was transferred to or vested in a purchaser (see s. 54). All that happened was that the mine owner came under a statutory obligation not to work or get a certain defined portion of coal which continued to be his own property. Unless every restrictive covenant which does not amount to a grant (see *Rowbotham* v. *Wilson* (2)), though given for consideration, is a sale to the covenantee, there is no sale here. Thirdly, the fetter so accepted by the owner could not be made the subject of a grant or conveyance so as to bind the land in the hands of successive owners. It is an arbitrary fetter debarring the owner from dealing with a given area of land in a particular way irrespective of whether it is more or less than is actually required for the support of the railway and whether or not substituted support is supplied by shoring or

(1) 19 Ch. D. at pp. 570, 575. (2) 8 H. L. C. 348.

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other means. The right to enforce such a restriction could not, in my judgment, be the subject of a grant so as to bind the land in the hands of successive owners: see *Keppel* v. *Bailey* (1), and the other cases collected in the notes to *Spencer's Case*. (2) Nothing but a statute could create such a right, and a statute has created it. It seems to me, therefore, that, if I am right as to any of the conditions imposed by the section, the instrument fails to fulfil any of them, and therefore does not fall within it.

STIRLING L.J. read the following judgment:—This case was argued on the footing that the transaction between the railway company and the mine owners stated in the special case resulted in the acquisition by the railway company, not of any property in the coal described in the instrument of December 6, 1898, but simply of the statutory right arising under s. 78 of the Railways Clauses Consolidation Act, 1845. That section requires the owner, lessee, or occupier of any mines or minerals lying under the railway, or works connected therewith, or within forty yards therefrom, to give thirty days' notice to the company of an intention to work the same; and it is thereupon provided that "if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and, if the company be willing to make compensation for such mines, or any part thereof, to such owner, lessee, or occupier thereof, then he shall not work or get the same." It imposes, therefore, on the mine owner, on certain conditions being satisfied, as they were in the case under consideration, a legal obligation *not* to work or get the mines or minerals; and it confers on the railway company a corresponding right, namely, to insist on the observance of that obligation, but not to make active use of the mine owner's property. Such a right differs from a right of support, being more extensive in some respects, and less so in others. In particular it differs in this, that the obligation under it is purely negative; whereas, according to the opinion expressed by Lord Selborne L.C. and Lords Blackburn and

(1) (1834) 2 My. & K. 517; 39 R. R. 264. (2) 1 Sm. L. C. 10th ed. p. 52.

Watson, in advising the House of Lords in *Dalton* v. *Angus* (1), a right of support to buildings is an easement *not purely negative*, and is capable of being created by grant. There is no authority that a right or obligation such as that which arises under s. 78 of the Railways Clauses Consolidation Act, 1845, is capable of being created by grant; and, upon the principles laid down in *Keppel* v. *Bailey* (2), and acted upon in *Ackroyd* v. *Smith* (3) and other cases, I am of opinion that it is not. A right and obligation of this kind could only be created (apart from statute) by covenant; and, if so created, would have different incidents from a legal right created by grant. This is pointed out by Mellish L.J. in *Leech* v. *Schweder*. (4)

Now, the claim of the Crown to ad valorem duty is based on the contention that the transaction referred to was a sale within the meaning of the Stamp Act. That transaction was one by which the mine owners, in consideration of a sum of money paid to them, became subject to a statutory obligation of a purely negative character: it closely resembles a transaction by which, for the like consideration, a mine owner has entered into a covenant not to work or get his mines or minerals. If one is a sale, so in my opinion is the other. In my judgment a covenant entered into for value to abstain from doing a particular act or class of acts is not a sale within the meaning of the Stamp Act. I think that, in order that there may be a sale within the meaning of that Act, there must be a transaction as the result of which, in the language of s. 54 of the Stamp Act, some "property, or estate or interest in property, is transferred to, or vested in a purchaser, or any other person on his behalf or by his direction"; and in the present case I am unable to see that any property, or any estate or interest in property, was so transferred or vested. I also think, as regards s. 60 of the Stamp Act, that the statutory right came into existence, at the latest, when the railway company gave notice of their willingness to treat, and consequently was in existence before the alleged sale. For these reasons I am of

(1) (1881) 6 App. Cas. 740.
(2) 2 My. & K. 517; 39 R. R. 264.
(3) (1850) 10 C. B. 164.
(4) (1874) L. R. 9 Ch. 463, at p. 475.

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opinion that the instrument of December 6, 1898, is not liable to ad valorem stamp duty, and that the appeal ought to be dismissed.

Appeal dismissed.

Solicitor for railway company: *R. Hill Dawe.*
Solicitor for the Crown: *Solicitor for Inland Revenue.*

E. L.

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[IN THE COURT OF APPEAL.]

THE SCHOOL BOARD FOR THE DISTRICT OF LLANBADARNFAWR *v.* THE OFFICIAL TRUSTEES OF CHARITABLE TRUSTS.

Charity—Administration—National School—Income of Endowments—Transfer to School Board—Action by Transferee—Certificate of Charity Commissioners—Administration of Charitable Trusts Act, 1853 (16 & 17 *Vict. c.* 137), *s.* 17—*Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *s.* 23.

The buildings and the income of the endowments of a National School were leased by the managers to a school board, under the powers given by s. 23 of the Elementary Education Act, 1870, for a term of years. At a subsequent date the then trustee of the endowments transferred them to the Charity Commissioners, and the defendants, as official trustees of charitable trusts, received the income arising from the funds. The school board brought an action against the defendants to recover the sums so received by them and for an inquiry as to the trust funds:—

Held, affirming the judgment of a Divisional Court, that the claim of the plaintiffs was under the trusts affecting the endowments and not a relief sought adversely to a charity, and that they were not entitled to bring the action without the consent of the Charity Commissioners under s. 17 of the Administration of Charitable Trusts Act, 1853.

APPEAL from a judgment of a Divisional Court on appeal from the county court of Cardiganshire.

The particulars of claim in the county court stated that by an indenture dated November 16, 1875, made between the managers of the Penyfron National School (which was an elementary school within the meaning of the Elementary Education Act, 1870), of the one part, and the plaintiffs of the

other part, the managers, under the authority of the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 23, and of the Acts incorporated therewith, demised to the plaintiffs all the interest during the term of sixty years of the managers or of any person who was trustee for them, in the school buildings called the Penyfron National School, subject to reservations therein mentioned, and the income of all endowments belonging to the school, to hold the school buildings and to receive and take the income of the endowments, paying therefor yearly to the vicar of Llanbadarnfawr for the time being as representative or trustee of the plaintiffs the yearly rent of 1*s*. That the endowments referred to comprised sums of 220*l*., 5*l*., and 15*l*., and that the plaintiffs until two years before the action received the income of the endowments. That the Rev. N. Thomas then became vicar of the parish of Llanbadarnfawr and declined to pay the income of the endowments to the plaintiffs, and transferred the endowments to the official trustees of charity funds. That the Rev. N. Thomas was under the indenture trustee for the plaintiffs of the endowments. The plaintiffs claimed (1.) An inquiry as to what the endowments which passed under the indenture consisted of, and what now represented those endowments. (2.) An inquiry as to what part thereof had come into the hands of the defendants. (3.) An inquiry how much of the income thereof had been received by the defendants, and payment of the same to the plaintiffs. (4.) That the trusts attaching to the endowments should be executed.

The reservations above referred to related to the user of the school buildings on Sundays and at other times on week-days when the same were not required by the plaintiffs for school purposes. The agreement on which the lease was based received the assent of the Education Department. The plaintiffs covenanted to pay the rent of 1*s*. and to maintain the school buildings in repair until the determination of the demise, and there was a proviso for re-entry for non-performance of the covenants.

At the hearing in the county court objection was taken on behalf of the defendants that no order or certificate of the

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LLANBADARNFAWR SCHOOL BOARD v. OFFICIAL TRUSTEES OF CHARITABLE TRUSTS.

Charity Commissioners had been obtained as required by the Administration of Charitable Trusts Act, 1853, s. 17. That section enacts that notice of legal proceedings as to any charity by any person except the Attorney-General shall be given to the Charity Commissioners, who may, if they think fit, by order or certificate, authorize the proceedings and give directions as to them, and the Courts are not to entertain proceedings as to charities except upon the certificate of the Board. The section contains the following proviso: "This enactment shall not extend to or affect any such petition or proceeding in which any person shall claim any property or seek any relief adversely to any charity."

Notice had been given to the Charity Commissioners, but no order or certificate had been obtained by the plaintiffs. The county court judge was of opinion that the case did not come within the proviso, and gave judgment for the defendants.

The plaintiffs appealed, and the appeal was dismissed by the Divisional Court (Lord Alverstone C.J. and Kennedy J.).

The plaintiffs appealed.

Bryn Roberts, for the plaintiffs. The plaintiffs are seeking relief adversely to a charity, and no certificate is necessary. Their claim is not under the original trusts relating to the property, but under the contract entered into with the trustees. The whole claim of the plaintiffs is founded on the deed, and they are asking for that which passed to them under the deed, but which by the wrongful action of the trustee has come into the hands of the defendants. They are claiming the income which belongs to them under the deed, and are entitled to recover it, as the Act does not interfere with rights of property: *Rendall* v. *Blair*. (1) [He cited also *Holme* v. *Guy* (2); *Benthall* v. *Earl of Kilmorey* (3), and *Rooke* v. *Dawson*. (4)]

Vaughan Hawkins, for the defendants, was not called on.

A. L. SMITH M.R. The point in this case is whether or not the action in the county court was a proceeding in which the

(1) (1890) 45 Ch. D. 139.
(2) (1877) 5 Ch. D. 901.
(3) (1883) 25 Ch. D. 39.
(4) [1895] 1 Ch. 480.

plaintiffs claimed any property or sought any relief adversely to any charity, because if it was not such a proceeding, there is no doubt that the certificate of the Charity Commissioners was a necessary preliminary to bringing the action. It seems to me that it is only necessary to read the particulars of claim to see that the objection taken by the defendants was well founded. It appears to me to be plain that this is a proceeding by cestuis que trustent to ascertain of what the trust fund consists, how much of those funds are in the hands of the official trustees, what part of the income is in their hands, and praying that that income may be paid over to the plaintiffs, and that the trusts attaching to the funds may be executed. It is clear that the plaintiffs under the Elementary Education Acts are in the position of a cestui que trust, and do not claim adversely to a charitable trust, but rely on such a trust and seek to enforce it. The judgment for the defendants was therefore right, and the appeal must be dismissed.

COLLINS L.J. I am of the same opinion.

ROMER L.J. I agree. I am of opinion that if, under s. 23 of the Elementary Education Act, 1870, an arrangement is made by the managers of an elementary school in the manner provided by the Act, whereby some interest in the endowment of the school is transferred to a school board, that body becomes a cestui que trust of the fund transferred. When the board proceed against the persons who have possession of the fund, to obtain payment of it, they are claiming under a charitable trust and cannot do that without a certificate of the Charity Commissioners. This is not like the case of a breach of contract, or a claim for specific performance, which are adverse to the charity, but a claim under the trust, which does not come within the proviso.

Appeal dismissed.

Solicitor for plaintiffs: *W. R. Owen.*

Solicitors for defendants: *Arthur Johnson Hughes, Aberystwith; The Solicitor for the Treasury.*

A. M.

1901
Jan. 22.

HOARE *v.* RITCHIE & SON.

Factory Acts—Factory—Ventilation—Dust generated and inhaled by Workers to Injurious Extent—No Evidence of Actual Injury—Factory and Workshop Act, 1878 (41 & 42 *Vict. c.* 16), *s.* 36.

By s. 36 of the Factory and Workshop Act, 1878, where in any factory a process is carried on by which dust is "generated and inhaled by the workers to an injurious extent," the factory inspector has power to require a fan or other means of ventilation to be provided. In proceedings under this section:—

Held, that it was not necessary to prove that any worker had sustained actual injury from inhaling the dust, but that it was sufficient if it was proved that dust was generated and inhaled by the workers to an extent that must in the long run be injurious.

CASE stated by a metropolitan police magistrate under the Summary Jurisdiction Acts.

An information was laid by the appellant (who was one of Her Majesty's inspectors of factories) under s. 36 of the Factory and Workshop Act, 1878, as extended by s. 33 of the Factory and Workshop Act, 1895, which alleged that the respondents, being the occupiers of a certain jute mill—the same being a factory within the meaning of the Factory and Workshop Acts, 1878 to 1895—wherein, on or about May 18, 1900, an impurity, to wit dust, was generated and inhaled by the workers to an injurious extent, did fail to provide, use, and maintain a fan or other mechanical means of a proper construction for preventing such inhalation within a reasonable time after due notice had been given by the appellant.

The following facts were proved:—

"The respondents are the occupiers of a jute mill at Carpenters Road, Stratford, in the county borough of West Ham, the same being a factory within the meaning of the Factory and Workshop Acts. In 'preparing' and 'batching' rooms in the said factory during the month of April, 1900, dust in large quantities was generated by the process there carried on. This dust consisted of jute fibre mixed with a small quantity of common dust. There was nothing of a poisonous character

in the dust. The use of fans as recommended by the appellant would reduce the amount of dust in the atmosphere inhaled by the workers. On April 17 notice to provide such fans within one month was duly served on the respondents by the appellant, but the respondents failed to comply therewith.

"Some one hundred and twenty persons are employed in the rooms in question. Of these, several selected by the appellant were medically examined on his behalf. Several more, also selected by the appellant, were called as witnesses. The evidence, however, failed to prove that any of the workers had suffered any injury to their health from inhaling the dust generated by the process there carried on. The appellant contended that dust in large quantities in the atmosphere must be injurious to the workers, and that it was not necessary to prove that any of the workers had actually suffered injury to health."

The magistrate dismissed the summons on the ground that it had not been proved that the dust generated by the process had been inhaled by the workers to an injurious extent, but stated this case for the opinion of the Court. (1)

Daldy (*H. Sutton* with him), for the appellant. The only question is whether on an information under the section it is necessary to shew that the workers have in fact been injured by inhaling the impure air. The magistrate has held that, as the evidence failed to satisfy him that any worker had actually sustained injury, the case of the appellant was not made out.

(1) By the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), s. 36, "If in a factory or workshop where .... any process is carried on by which dust is generated and inhaled by the workers to an injurious extent it appears to an inspector that such inhalation could be to a great extent prevented by the use of a fan or other mechanical means, the inspector may direct a fan or other mechanical means of a proper construction for preventing such inhalation to be provided within a reasonable time; and if the same is not provided, maintained, and used, the factory or workshop shall be deemed not to be kept in conformity with this Act."

By the Factory and Workshop Act, 1895 (58 & 59 Vict. c. 37), s. 33, "Sect. 36 of the principal Act shall extend to any factory or workshop where any process is carried on by which any gas, vapour, or other impurity is generated and inhaled by the workers to an injurious extent."

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HOARE v. RITCHIE & SON.

It is sufficient, however, to shew such a state of things as must necessarily be injurious to the workers. The object of the section was to prevent workers from being injured; and if the air is so impure that it must have a tendency to injure them, that is enough.

[He was stopped.]

The respondents did not appear.

BRUCE J. I do not think that the learned magistrate has found the right point. The question he had to determine was whether dust was generated or inhaled by the workers to an injurious extent—that is, whether the tendency was to injure the workers. It may be that it is only after some long exposure to these injurious airs that the workers are injured; but if the air is so impure as necessarily to be injurious to health, then I think that the Act has been infringed, and it is for the magistrate to find that fact, which he seems not to have found. It is not necessary that it should actually be proved to be injurious to any of the workers, but it is enough that it is of such a character that it would in the long run be injurious to them. The learned magistrate should find, quite apart from the question whether any person has been injured, whether the dust is generated and inhaled by the workers to an injurious extent—to such an extent that its tendency is necessarily to injure their health in the long run. That is, I think, the point.

PHILLIMORE J. The case must go back for the magistrate to find whether or not the dust is generated and inhaled to an injurious extent, with an intimation that it is not necessary to prove actual injury to the health of any particular person.

Appeal allowed. Case remitted to the magistrate.

Solicitor for appellant: *The Solicitor to the Treasury.*

A. P. P. K.

DICKINS *v.* RANDERSON.

1901
Jan. 25, 29.

Adulteration—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*British Pharmacopœia—Standard Strength of Drugs—Pharmacy Act*, 1868 (31 & 32 *Vict. c.* 121), *s.* 15.

A purchaser went into a chemist's shop and asked to be supplied with "mercury ointment." Mercury ointment is one of the medicines contained in the British Pharmacopœia. The chemist supplied him with an ointment containing a less proportion of mercury than that prescribed by the formulary of the Pharmacopœia:—

Held, that, although the purchaser did not refer to the Pharmacopœia, he must be taken to have demanded that the ointment should be compounded of the proportions therein prescribed, and that upon a complaint under s. 6 of the Sale of Food and Drugs Act, 1875, the vendor was rightly convicted of having sold a drug not being of the quality demanded by the purchaser.

White v. *Bywater*, (1887) 19 Q. B. D. 582, followed.

Held, also, that the fact of the ointment being a compounded drug did not make the sale of it as above mentioned any the less an offence within s. 6.

CASE stated by justices for the West Riding of Yorkshire.

An information was laid by the respondent, an inspector of food and drugs appointed by the county council of the said Riding, against the appellant under s. 6 of the Sale of Food and Drugs Act, 1875, charging that the appellant on May 14, 1900, unlawfully sold to the prejudice of the respondent, the purchaser, a certain drug—namely, two ounces of mercury ointment, which on analysis was found to be deficient in mercury and contained the parts as follows: Mercury, 12·5 per cent.; lard and suet, 87·5 per cent., and was not of the nature, substance, and quality demanded by the purchaser.

The following facts were proved or admitted:—

On May 14 the respondent went to the premises known as "Taylor's Drug Stores" at Skipton, where the appellant, who was a duly certified chemist, was at that time employed, and asked to be supplied with two ounces of "mercury ointment." Ointment was supplied to him by the appellant in a small wooden box, the end of which was labelled "The Ointment Mercurial Poison," the words "The Ointment" being in print,

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DICKINS v. RANDERSON.

and the remainder in writing. He also handed to the respondent a bill in which he charged "Mercurial ointment, 4*d.*," which sum the respondent handed to the appellant. A portion of the ointment was subsequently analyzed by the public analyst, who certified that the sample contained the parts following: Mercury, 12·5 per cent.; lard and suet, 87·5 per cent.

Mercury ointment, according to the directions of the British Pharmacopœia, contains 48·5 per cent. of mercury. The respondent admitted that he asked for "mercury ointment" simply, and that he did not state that he required the same to be according to the directions of the British Pharmacopœia, and that the ointment sold to him by the appellant contained the ingredients mentioned in the British Pharmacopœia for mercury ointment, but not in the proportions therein prescribed. He did not allege that the preparation was injurious to the purchaser, or that there was any imposition on the part of the appellant; but he contended that as the ointment supplied was not according to the standard of the British Pharmacopœia it was not of the nature, substance, and quality demanded within the meaning of the statute, and relied upon the case of *White* v. *Bywater* (1); and he also contended that mercury ointment was not a compounded drug within the meaning of the statute.

It was contended on behalf of the appellant that the proceedings would not lie under s. 6 of the said Act (2), but ought to have been taken under s. 7, the article in question being a compounded drug. The justices held that the proceedings were properly taken under s. 6 and overruled the objection.

The appellant gave evidence that the ointment supplied was a dilute preparation of mercury ointment well known to and

(1) 19 Q. B. D. 582.

(2) By s. 6 of the Sale of Food and Drugs Act, 1875, it is enacted that "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by the purchaser, under a penalty not exceeding twenty pounds: Provided that an offence shall not be deemed to be committed under this section in the following cases; that is to say,

"(3.) Where the food or drug is compounded as in this Act mentioned."

By s. 7, "No person shall sell any . . . . compounded drug which is not composed of ingredients in accordance with the demand of the purchaser, under a penalty not exceeding twenty pounds."

supplied by all retail chemists, and such as would be usually supplied to a person inquiring for mercury ointment. He stated that out of hundreds of sales of that commodity which he had made he had never supplied it according to the standard of the British Pharmacopœia for human application, except when making up the prescription of a medical practitioner, for the reason that he considered the frequent use thereof by a person of a delicate constitution might probably set up mercurial poisoning from which death might ensue. Both the dilute and the standard preparations were kept in stock by the appellant's employers at the said premises. The dilute preparation was known to the public by a variety of names, and it was usually asked for under the name of "blue ointment." Two other chemists of thirty-five and twenty-seven years' standing respectively were called as witnesses for the appellant, and gave similar evidence as to the practice of chemists in supplying mercury ointment.

Upon this evidence it was contended on behalf of the appellant (*a*) that he was not in law required to sell "mercury ointment" to a purchaser in accordance with the standard quality prescribed by the British Pharmacopœia, except when specifically asked by the purchaser to do so, or when making up the prescription of a medical practitioner, and that accordingly it was within the discretion of the appellant to supply the dilute preparation in all cases in which he thought fit to do so; (*b*) that the respondent had failed to establish that the said commodity was not of the nature, substance, and quality demanded by the purchaser, or that he had been prejudiced by the sale, and that therefore no offence had been committed, and he relied upon *Lane* v. *Collins*. (1)

The justices were of opinion that the commodity sold was not of the nature, substance, and quality demanded by the purchaser, and that the appellant was bound to supply the said commodity according to the formula prescribed in the British Pharmacopœia, whether expressly asked to do so or not. They accordingly convicted the appellant, subject to a case for the opinion of the Court.

(1) (1884) 14 Q. B. D. 193.

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C. A. Russell, K.C., and *Compston*, for the appellant. The Pharmacy Act, 1868 (1), no doubt requires that the formularies of the British Pharmacopœia shall be followed, and subjects to a penalty any person who compounds the therein-mentioned medicines in any other manner. But the question is whether the appellant was liable under the Sale of Food and Drugs Act. Whether "mercury ointment" is generally understood in the trade to mean mercury ointment of the strength specified in the Pharmacopœia is a question of fact, and the justices have not found that fact against the appellant. The evidence went to shew that chemists make a practice of selling this ointment of two different strengths, and that the name "mercury ointment" is in common parlance applied to the dilute form as well as to the stronger. Under those circumstances, it ought not in the absence of evidence to be assumed that the purchaser demanded one form rather than the other. It cannot be that the Legislature intended in the Pharmacy Act to appropriate to a particular limited meaning terms commonly used with a wider meaning. A person who was in the habit of buying under the name of "mercury ointment" the weaker form of ointment, would have a good ground of complaint if when asking for mercury ointment under that name he were supplied with an ointment of the strength prescribed by the Pharmacopœia. Secondly, the proceedings were taken under the wrong section. Mercury ointment is a compounded drug, and as such is excluded from the enacting part of s. 6 by sub-s. 3. The proceedings, if any, should have been under s. 7, to which the words "compounded as in this Act mentioned" in s. 6, sub-s. 3, refer. The decision in *Beardsley* v. *Walton* (2) is no doubt against the appellant's contention in this respect; but that case is in conflict with the opinion of Wright J. in *Houghton* v. *Taplin*. (3)

Danckwerts, K.C., and *Roskill*, for the respondent. The

(1) By s. 15 of the Pharmacy Act, 1868, "Any person . . . . who shall compound any medicines of the British Pharmacopœia except according to the formularies of the said Pharmacopœia" shall be guilty of an offence. By s. 16, the said provision is not to apply to any legally qualified apothecary.

(2) [1900] 2 Q. B. 1.

(3) (1897) 13 Times L. R. 386.

Pharmacy Act having made it illegal for any person, other than a legally qualified medical man, to compound such a drug as mercury ointment otherwise than according to the Pharmacopœia, it could not be an article of lawful commerce if otherwise compounded, and the appellant ought to have understood that when asked for mercury ointment he was being asked for something which might be lawfully sold under that name, for he was not a qualified medical man. This question is concluded by the authority of *White* v. *Bywater*. (1) The other point is equally concluded by *Beardsley* v. *Walton* (2)

Compston, in reply.

Cur. adv. vult.

Jan. 29. The judgment of the Court (Bruce and Phillimore JJ.) was delivered by

PHILLIMORE J. We think that this conviction must stand. The appellant professed to sell mercurial or mercury ointment. Mercury ointment is a drug in the British Pharmacopœia, known by that name, and having a certain fixed ratio of mercury to unguent. The appellant was asked for mercury ointment, and should have sold the drug in the Pharmacopœia; or, if he was going to do what he in fact did, namely, sell an ointment in which the mercury was about one-quarter strength, he should, if he may lawfully sell such a drug (see s. 15 of the Pharmacy Act, 1868), have explained that he was selling a weaker or diluted drug, and have so named it. He acted under no sordid motives, but none the less was he in the habit of selling to his customers something which was not of the nature, substance, and quality which they must be taken to have demanded, and which certainly the purchaser in this case demanded.

It is said that the appellant sold the mercury ointment of commerce, and that for commercial purposes there is a standard different from that of the Pharmacopœia. Having regard to s. 15 of the Pharmacy Act, 1868, that is unlikely, though perhaps possible. But he failed altogether to prove that there was any commercial standard for this article different from

(1) 19 Q. B. D. 582. (2) [1900] 2 Q. B. 1.

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Phillimore J.

that of the Pharmacopœia. He did not even attempt to prove it. What he attempted to prove was that there were two commercial standards of wide difference—a thing in itself unreasonable—while he stated that he kept both standards in his shop, and sold according to one standard or the other according as the customer brought or did not bring a prescription from a medical man. He might almost as well have kept two weights and two measures. The practical mischief of such a practice was pointed out in the argument. If there be any danger on the other side, it would be avoided by the simple expedient of having (if he lawfully may) two drugs, calling them, as in fact they are, the strong one "mercury ointment," the weak one "diluted mercury ointment," and recommending the latter to any customer whom he might think unskilled and likely to use the proper drug in a dangerous manner.

The cases of *White* v. *Bywater* (1) and *Beardsley* v. *Walton* (2) almost, if not quite, conclude the matter. But without them we should have arrived at the same result upon the construction of s. 6 of the Sale of Food and Drugs Act, 1875. They establish, and we should have thought without their assistance, that if a drug is to be found in the Pharmacopœia, and if that drug is asked for, that drug must be supplied; and that if it is not sold with the ingredients and in the proportions prescribed by the Pharmacopœia, there is at least primâ facie evidence that what is sold is not of the nature, substance, and quality which was demanded.

It was argued that as the drug in question was a compounded drug proceedings ought not to have been taken under s. 6 of the Sale of Food and Drugs Act, but under s. 7; and for this purpose some observations of Wright J. in *Houghton* v. *Taplin* (3) were invoked. We think that these observations have been misunderstood. In any case, it is quite clear from the definition clause that a compounded drug is none the less a drug, which shews that proceedings can be taken under s. 6; though it may be that in the case of a compounded drug they can also be taken under s. 7.

(1) 19 Q. B. D. 582. (2) [1900] 2 Q. B. 1.
(3) 13 Times L. R. 386.

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Phillimore J.

We entertain no doubt that the appellant sold to the prejudice of the purchaser a drug which was not of the quality of the article demanded by the purchaser, and so contravened the provisions of the earlier part of s. 6. But the difficulty we have felt arises from the provision that the offence shall not be deemed to have been committed under that section where the drug is compounded as in the Act mentioned. It was argued by counsel for the appellant that because the article in question was a compounded drug the sale of it fell within the exception in s. 6, sub-s. 3, and constituted an offence not under s. 6, but only under s. 7. We think it probably did constitute an offence under s. 7, but we think it did also constitute an offence under s. 6. The exception in s. 6, sub-s. 3, does not apply to all compounded drugs, but only to drugs compounded as in the Act mentioned. It is very difficult to understand the meaning of the words "as in this Act mentioned," because we can find no provisions in the Act to which the words can apply. But it seems to us that it is impossible to reject the words. We cannot read the exception in sub-s. 3 as if it were not qualified by the concluding words. But although it is difficult to say what is the exact meaning of the words, this we think is clear—that no possible meaning that can be given to the words can apply to the ointment in the present case; it was certainly not compounded as in the Act mentioned. The sale of it, therefore, does not fall within the exception.

Appeal dismissed.

Solicitor for appellant: *A. Hare, for W. E. Farr, Leeds.*

Solicitors for respondent: *Clement Williams & Co., for Trevor Edwards, Wakefield.*

J. F. C.

1901
Jan. 11, 18.

TRACEY *v.* PRETTY & SONS.

Factory Acts — Factory — Provision of Sanitary Conveniences — Failure of Sanitary Authority to take Proceedings on Notice from Factory Inspector — Power of Factory Inspector to make Requirement — Jurisdiction of Justices to inquire into Sufficiency of Sanitary Accommodation — Appeal to Quarter Sessions from Requirement of Factory Inspector — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 38 — *Factory and Workshop Act*, 1878 (41 & 42 *Vict. c.* 16), *s.* 4 — *Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *ss.* 7, 22 — *Factory and Workshop Act*, 1891 (54 & 55 *Vict. c.* 75), *s.* 2 — *Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *ss.* 3, 35.

By the Factory and Workshop Act, 1891, s. 2, sub-s. 2, where notice of an act, neglect, or default is given by a factory inspector under s. 4 of the Factory and Workshop Act, 1878, to a sanitary authority, and proceedings are not taken within a reasonable time for punishing or remedying the act, neglect, or default, the inspector may take "the like proceedings for punishing or remedying the same as the sanitary authority might have taken." A factory inspector having given notice to a sanitary authority that there was a deficiency of sanitary accommodation in a certain factory within their district, and the sanitary authority not having taken within a reasonable time any proceedings for punishing or remedying the same, the inspector gave notice to the factory owner under this sub-section and under s. 22 of the Public Health Acts Amendment Act, 1890, which had been adopted in the district, requiring him to erect certain specified sanitary conveniences, and on his neglect to comply with the notice summoned him before justices in petty sessions:—

Held (by Lord Alverstone C.J., Grantham, Bruce, and Darling JJ., Phillimore J. dissenting), that the justices had no jurisdiction to inquire into the suitability or sufficiency of the sanitary accommodation existing at the factory, or required by the notice of the inspector.

Semble, that an appeal lies to quarter sessions under s. 7 of the Public Health Acts Amendment Act, 1890, from the requirement of the factory inspector in such a case.

Case stated by justices of Ipswich, who had dismissed an information and complaint by Anna Tracey, one of Her Majesty's inspectors of factories and workshops, that the occupiers of a building used as a manufactory situate in the borough, at the said building, on July 16, 1899, and on divers subsequent days, had unlawfully neglected or refused to comply with the requirements of a certain notice in writing, dated

May 15, 1899, given pursuant to s. 2 of the Factory and Workshop Act, 1891, and the Acts amending the same, and to s. 22, sub-s. 2, of the Public Health Acts Amendment Act, 1890, requiring the occupiers within two months from the date of such notice to provide the building with suitable and sufficient accommodation in the way of sanitary conveniences, having regard to the number of persons employed or in attendance at the building, and with proper separate accommodation for persons of each sex, and for that purpose to provide for the use of the females so employed or in attendance eighteen additional water-closets with proper fittings and appurtenances.

The following facts were proved or admitted: The respondents were the occupiers of the building which was used as a corset factory. The Public Health Acts Amendment Act, 1890, had been adopted in the borough of Ipswich. The building in question was a factory within the meaning of the Factory and Workshop Acts, 1878 to 1895, and was situate within the sanitary district of the Ipswich urban sanitary authority. The appellant was an inspector under the Factory and Workshop Acts, 1878 to 1895. The notice prescribed by s. 4 of the Factory and Workshop Act, 1878, was given to the sanitary authority by means of a letter dated March 2, 1899, of which, so far as material, the following is a copy: "I beg to inform you that on visiting the corset factory occupied by Messrs. Pretty & Sons, and situated at Tower Ramparts, Ipswich, the undermentioned sanitary matters appear to require attention: Insufficient sanitary accommodation provided for women. 730 women when visited; full number, 1000; 14 sanitary conveniences provided." It appeared to the appellant that the acts, neglects, and defaults alleged in the letter of March 2, 1899, were punishable or remediable under the laws relating to public health, but not under the Factory and Workshop Act, 1878. Proceedings were not taken by the sanitary authority upon the notice, so far as it related to the alleged insufficiency of sanitary accommodation for women, against the owners or occupiers of the factory. It appeared to the appellant that the provisions of s. 22, sub-s. 1, of the Public Health Acts Amendment Act, 1890, were not complied with on May 15, 1899, in

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the case of the factory. The appellant gave a written notice to the respondents, the occupiers of the factory, of which the following is a copy:—

"Factory Department,
"Home Office, London, S.W.

"I, the undersigned, one of Her Majesty's inspectors of factories, acting in pursuance of s. 4 of the Factory and Workshop Act, 1878, s. 2 of the Factory and Workshop Act, 1891, and s. 3 of the Factory and Workshop Act, 1895, hereby give you notice under s. 22, sub-s. 2, of the Public Health Acts Amendment Act, 1890, that the provisions of s. 22, sub-s. 1, of that Act are not complied with in the building of which you are occupier, used as a manufactory, and situated at Tower Ramparts, Ipswich, the same being a factory within the meaning of the Factory and Workshop Act, 1878; and I hereby require you, within two calendar months from the date of this notice to provide the said building with sufficient and suitable accommodation in the way of sanitary conveniences, having regard to the number of persons employed or in attendance at the said building, and with proper separate accommodation for persons of each sex, and for that purpose to provide for the use of the females so employed or in attendance eighteen additional water-closets, with proper fittings and appurtenances. If you neglect or refuse to comply with this notice you will be liable for such default to a penalty not exceeding 20*l.* and to a daily penalty not exceeding 40*s.*, and proceedings will be taken in pursuance of the said s. 22 of the Public Health Acts Amendment Act, 1890, to recover the same.

"Anna Tracey.

"To Messrs. Pretty & Sons, Limited,
"May 15, 1899."

The respondents neglected or refused to comply with the last-mentioned notice.

On behalf of the appellant it was contended on the above stated facts that the court of summary jurisdiction had no jurisdiction to hear evidence upon or decide the question of the suitability or sufficiency of the accommodation in the way of

sanitary conveniences existing in the factory, or the necessity for the further accommodation required by the notice dated May 15, 1899, and that these questions were by law left to the discretion of the appellant. On behalf of the respondents it was contended that the matters were questions of fact which the justices had jurisdiction to decide upon evidence to be given before them.

The justices decided in favour of the contentions of the respondents, and accordingly heard evidence on behalf of the appellant and the respondents; and upon that evidence dismissed the summons and ordered the appellant to pay 6*l.* 4*s.* costs. The justices found as facts: (1.) That the existing sanitary accommodation in the factory was suitable and sufficient; (2.) that the sanitary authority had made all due inquiry into the suitability and sufficiency of the sanitary accommodation existing in the factory, and had found the accommodation to be suitable and sufficient. The question for the opinion of the Court was whether the justices had jurisdiction to hear evidence upon or decide the question of suitability or sufficiency of the accommodation existing in the factory, or required by the notice. (1)

(1) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 38, "Where it appears to any local authority by the report of their surveyor that any house is used or intended to be used as a factory or building in which persons of both sexes are employed or intended to be employed at one time in any manufacture, trade, or business, the local authority may, if they think fit, by written notice, require the owner or occupier of such house, within the time therein specified, to construct a sufficient number of water-closets, earth-closets, or privies and ashpits for the separate use of each sex. Any person who neglects or refuses to comply with any such notice shall be liable for each default to a penalty not exceeding 20*l.*, and to a further penalty not exceeding 40*s.* for every day during which the default is continued."

By the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), s. 4, "Where it appears to an inspector under this Act that any act, neglect, or default in relation to any drain, water-closet, earth-closet, privy, ashpit, water supply, nuisance, or other matter in a factory or workshop is punishable or remediable under the law relating to public health, but not under this Act, that inspector shall give notice in writing of such act, neglect, or default to the sanitary authority in whose district the factory or workshop is situate; and it shall be the duty of the sanitary authority to make such inquiry into the subject of the notice, and take such action thereon, as to that authority may seem proper

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The Attorney-General (*Sir R. B. Finlay, Q.C.*), (*H. Sutton* and *R. D. Muir* with him), for the appellant. The justices had

for the purpose of enforcing the law. . . ."

By the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 7, "(1.) Any person aggrieved—(*a*) by any order, judgment, determination, or requirement of a local authority under this Act; (*b*) by the withholding of any order, certificate, licence, consent, or approval, which may be made, granted, or given by a local authority under this Act; (*c*) by any conviction or order of a court of summary jurisdiction under any provision of this Act—may appeal in manner provided by the Summary Jurisdiction Acts to a court of quarter sessions. (2.) This section shall not apply in cases where there is an appeal to the Local Government Board under s. 268 of the Public Health Act, 1875."

By s. 22, "(1.) Every building used as a workshop or manufactory, or where persons are employed or intended to be employed in any trade or business, whether erected before or after the adoption of this part of this Act, in any district, shall be provided with sufficient and suitable accommodation in the way of sanitary conveniences, having regard to the number of persons employed in, or in attendance at, such building, and also where persons of both sexes are employed or intended to be employed or in attendance, with proper separate accommodation for persons of each sex. (2.) Where it appears to an urban authority on the report of their surveyor that the provisions of this section are not complied with in the case of any building the urban authority may, if they think fit, by written notice, require the owner or occupier of any such building to make such alterations and additions therein as may be required to give such sufficient, suitable, and proper accommodation as aforesaid. (3.) Any person who neglects or refuses to comply with any such notice shall be liable for such default to a penalty not exceeding 20*l.*, and to a daily penalty not exceeding 40*s.* (4.) Where this section is in force s. 38 of the Public Health Act, 1875, shall be repealed."

By the Factory and Workshop Act, 1891 (54 & 55 Vict. c. 75), s. 2, "(1.) Sect. 4 of the principal Act shall apply to workshops conducted on the system of not employing any child, young person, or woman therein, and to laundries. (2.) Where notice of an act, neglect, or default is given by an inspector under the said s. 4 as amended by this Act to a sanitary authority, and proceedings are not taken within a reasonable time for punishing or remedying the act, neglect, or default, the inspector may take the like proceedings for punishing or remedying the same as the sanitary authority might have taken, and shall be entitled to recover from the sanitary authority all such expenses in and about the proceedings as the inspector incurs and are not recovered from any other person, and have not been incurred in any unsuccessful proceedings."

By the Factory and Workshop Act, 1895 (58 & 59 Vict. c. 37), s. 3, "(1.) Where notice of an act, neglect, or default is given by an inspector under s. 4 of the principal Act to a sanitary authority it shall be the duty of the sanitary authority to inform the inspector of the proceedings taken in consequence of the notice. (2.) In s. 2 of the Act of 1891 for the words 'within a reasonable time' shall be

no jurisdiction to inquire into the sufficiency of the sanitary accommodation nor into the necessity for the requirement; as to that the factory inspector is the sole judge, subject to an appeal from the requirement to quarter sessions. The course of proceedings followed by the inspector in this case was first to give notice to the sanitary authority that the accommodation in the way of sanitary conveniences as prescribed by s. 4 of the Factory and Workshop Act, 1878, at the factory was insufficient. That notice left the duty of inquiry and taking action to the sanitary authority. As the sanitary authority took no steps in the matter, the factory inspector then acted under s. 2 of the Factory and Workshop Act, 1891, and made the requirement contained in the letter of May 15 on the respondents. The Public Health Acts Amendment Act, 1890, having been adopted in the borough, s. 38 of the Public Health Act, 1875, is repealed, and the only proceedings which can be taken by the sanitary authority are under s. 22 of the later Act. The requirement of the sanitary authority under that Act was by s. 7 made subject to an appeal to quarter sessions; and as the power given to the factory inspector by the Act of 1891 is a power to take the like proceedings, those words would make the requirement given by the factory inspector also subject to an appeal to quarter sessions. No such appeal having been made, there is no power to go behind the requirement before the justices.

Macmorran, Q.C. (*E. E. Wild* with him), for the respondents. In proceedings taken under s. 38 of the Public Health Act, 1875, the justices could inquire into the sufficiency of the accommodation provided: *Hargreaves* v. *Taylor* (1); *St. Luke's*

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substituted the words 'within one month.'"

By s. 35, "(1.) In every place where s. 22 of the Public Health Acts Amendment Act, 1890, is not in force every factory or workshop shall be provided with sufficient and suitable accommodation in the way of sanitary conveniences, having regard to the number of persons employed in or in attendance at the factory or workshop, and also where persons of both sexes are employed or intended to be employed, or in attendance, with proper separate accommodation for persons of each sex. (2.) A factory or workshop in which there is a contravention of this section shall be deemed not to be kept in conformity with the principal Act."

(1) (1863) 3 B. & S. 613.

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Vestry v. *Lewis*. (1) The only cases where they could not do so was where, under s. 268 of that Act, there was an appeal to the Local Government Board. There is no appeal to the Local Government Board in proceedings under s. 22 of the Act of 1890, the only appeal being to quarter sessions under s. 7. Sect. 4 of the Factory Act, 1878, had no application to s. 38 of the Public Health Act, 1875. Where the Act of 1890 has not been adopted the old proceedings under the Public Health Act, 1875, must be taken, and the factory owner would be able to raise all these questions. Can it be that where, as here, the Act has been adopted he has no such rights? Secondly, there has been here no act, neglect, or default in relation to a water-closet which would entitle the factory inspector to act under s. 4 of the Factory Act, 1878. The mere neglect to provide sufficient water-closets is not a "neglect in relation to any water-closet."

It cannot have been intended that the factory inspector should override the considered decision of the sanitary authority, who may have decided that it would not be just to take proceedings to punish the factory owner. They have "taken proceedings" within the meaning of the section if they have considered the matter and decided against the factory inspector. Sect. 7 only gives an appeal to quarter sessions from the requirement of a local authority, and it would be straining language to make that section give an appeal from the requirement of a factory inspector.

The Attorney-General, in reply. There is no hardship in saying that the question of the sufficiency of the accommodation provided cannot be inquired into by the justices: *Hargreaves* v. *Taylor* (2); *Bogle* v. *Sherborne Local Board* (3); *Robinson* v. *Sunderland Corporation* (4); *Stroud* v. *Wandsworth Board of Works*. (5)

Cur. adv. vult.

Jan. 18. LORD ALVERSTONE C.J. read the following judgment:—This case raises, in my opinion, questions of very con-

(1) (1862) 1 B. & S. 865.
(2) 3 B. & S. 613.
(3) (1880) 46 J. P. 675.
(4) [1899] 1 Q. B. 751.
(5) [1894] 2 Q. B. 1.

siderable difficulty, and I express my judgment with great hesitation. After the best consideration I can give I have, however, come to the conclusion that the appellant is entitled to judgment. The substantial question which arises is whether upon a summons for penalties under sub-s. 3 of s. 22 of the Public Health Acts Amendment Act, 1890, for neglect to comply with a notice given by a factory inspector, it is competent for the magistrates to receive evidence upon the merits as to the necessity for the sanitary accommodation required by such notice. The difficulty arises from the fact that the powers of the factory inspector in the matter are given by reference to the powers of the sanitary authority under the Public Health Act; and we have to determine to what extent the powers of the sanitary authority are transferred under the general words used. Certain other incidental points arise which I will consider in the course of my judgment. In dealing with cases of legislation by reference, I think that, as a rule, the primary consideration to be kept in view is the general scope and object of the amending legislation, as this affords some guide as to whether a wide or narrow interpretation is to be put upon general words or expressions capable of a wider or narrower meaning. By the 4th section of the Factory and Workshop Act, 1878, it is provided that where it appears to an inspector under the Act that any neglect or default in relation to any water-closet, earth-closet, or other matter in the factory or workshop is punishable or remediable under the law relating to public health, and not under the Factory and Workshop Act, 1878, the inspector shall give notice in writing of such act, neglect, or default to the sanitary authority of the district, and it shall be the duty of the sanitary authority to make such inquiry into the subject of the notice and take such action thereon as to the authority may seem proper for the purpose of enforcing the law. By the same section it is provided that an inspector under the Act may for the purposes of the section take with him to the factory a medical officer of health, inspector of nuisances, or other officer of the sanitary authority. The material provisions of the law relating to public health which were in force at that time, namely, at the passing of the Factory

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and Workshop Act, 1878, are to be found in ss. 35, 36, and 38 of the Public Health Act, 1875. The most material section is the 38th, which provided that, where it appeared to any local authority by the report of their surveyor that any house was used or intended to be used as a factory in which persons of both sexes were employed, the local authority might, if they thought fit, by written notice require the owner within a time specified in the notice to construct a sufficient number of water-closets, earth-closets, or privies for the separate use of each sex. The section provided a penalty for neglect to comply with such notice. No appeal was provided against the requirements of the local authority under this Act. By s. 22 of the Public Health Acts Amendment Act, 1890, which is the section under which the question in this case arises, further powers were given to the sanitary authority. Sub-s. 1 of that section provides that every building used as a workshop shall be provided with sufficient and suitable accommodation in the way of sanitary conveniences, having regard to the number of persons employed, and also where persons of both sexes are employed with proper separate accommodation for persons of each sex. It further provides by sub-s. 2 that where it appears to an urban authority on the report of their surveyor that the provisions of this section are not complied with they may by written notice require the owner or occupier to make such alterations and additions therein as may be required to give such sufficient, suitable, and proper accommodation. Sub-s. 3 prescribes a penalty for neglect or refusal to comply with such notice. Pausing for a moment, it was contended on behalf of the respondents that under this section the urban authority could only give a general notice requiring the owner or occupier to provide sufficient and proper accommodation; on behalf of the appellants it was contended that the urban authority must by the notice specify the alterations and additions which they require to be made. I think the latter view is correct. The section provides a penalty for neglect or refusal to comply with the notice. It would, I think, be inconsistent with such an enactment that the notice should be in general terms only, as the person to whom it was given would in that case have no means

of knowing how he could avoid the liability to a penalty. But in addition, by s. 7 of the same Act, an appeal to quarter sessions is given against any requirement of a local authority, and I think that it was intended that on such an appeal not only the question of the necessity for some additional accommodation but also the reasonableness or propriety of the amount of the accommodation required by the notice might be raised. It was further contended before us on behalf of the respondents that s. 4 of the Act of 1878 did not apply to this section, that s. 4 enabled notice to be given only in the case of some neglect or default in relation to an existing water-closet, earth-closet, privy, or ashpit, and not in relation to alleged insufficiency of accommodation. In my opinion this contention is unsound. I think the factory inspector may give notice to the sanitary authority in respect of a neglect by the owner or occupier of a factory to comply with the provisions of sub-s. 1 of s. 22 of the Act of 1890. I may further point out that this seems to be placed beyond all doubt by the provisions of s. 35 of the Factory and Workshop Act, 1895, which provides that in every place where s. 22 of the Public Health Acts Amendment Act, 1890, is not in force, every factory or workshop where persons of both sexes are employed shall have separate accommodation, and that a factory or workshop in which there is contravention of this section shall be deemed not to be occupied in conformity with the Factory and Workshop Act, 1878. If s. 22 of the Act of 1890 is in force the rights and duties of the parties must be governed by that section. Thus far I have only considered the powers which were given to the factory inspector to put the sanitary authority in motion; but by sub-s. 2 of s. 2 of the Act of 1891, under which the particular question in this case arises, it is provided that where notice of an act, neglect, or default is given by the factory inspector under s. 4 of the Act of 1878 to a sanitary authority, and proceedings are not taken within a reasonable time (fixed by sub-s. 2 of s. 3 of the Factory and Workshop Act, 1895, at one month) for punishing or remedying the act, neglect, or default, the inspector may take the like proceedings for punishing or remedying as the sanitary authority might have taken.

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The question which arises in this case is, whether the words "like proceedings for punishing or remedying" are confined to legal proceedings in respect of the neglect of an owner or occupier to comply with the notice given by an urban authority under sub-s. 2 of s. 22 of the Public Health Act of 1890, or whether they give the factory inspector the right himself to give a notice under sub-s. 2 of s. 22 of the Act of 1890 requiring alterations and additions to be made. The question is, as I have said, one of very great difficulty. The word "proceedings" is not the word one would have expected to find as applicable to a notice or requirement. Moreover, unless a requirement given by a factory inspector is subject to the appeal to quarter sessions, under s. 7 of the Act of 1890, as in the case of a requirement by the local authority, I should without hesitation have come to the conclusion that a factory inspector was not entitled to give such notice. It seems to me clear that the Legislature could not, without express words, make the opinion of a factory inspector as to the amount of accommodation required final and conclusive upon the factory owner or occupier. But the words in sub-s. 2 of s. 2 of the Act of 1891 are, "the like proceedings for punishing or remedying the same," and unless we hold that the factory inspector may give the notice provided by sub-s. 2 of s. 22 of the Act of 1890, it seems to me that we should be giving no effect to the words "proceedings for remedying" as distinguished from punishing. It is here, I think, that we get assistance in considering what is the general tendency and scope of the legislation. By the Act of 1878 the factory inspector could only give notice to the sanitary authority. The sanitary authority could only give a general notice to the factory owner. By the Act of 1890 further powers are given to the sanitary authority, and an appeal is provided against the requirement. Sect. 2 of the Act of 1891 appears to deal with the case where the sanitary authority for some reason or other does not take sufficient steps to exercise their powers, and I think we can gather from this course of legislation that it was intended to supplement the powers of the sanitary authority by giving the factory inspector an independent power of taking

proceedings for remedying and punishing in cases in which the sanitary authority neglected to act. It was contended before us by the respondents that no appeal was given in the case of a notice of requirement served by the factory inspector. I have already said that if I had come to this conclusion I should not have decided in favour of the appellant; but if the view which I have taken is correct—namely, that the factory inspector stands in the place of the local authority for the purpose of giving a notice of requirement under sub-s. 2 of s. 22 of the Act of 1890—then, in my opinion, the words "like proceedings" would render any such notice the subject of appeal under s. 7 of the same Act. If this view be correct, effect would be given to that which I gather to have been the intention of the Legislature without any injustice to the factory or workshop owner. The notice given by the factory inspector will be subject to appeal, and, if not appealed against, would have the same effect as a notice given by the sanitary authority. There remains one other contention of the respondents which must be noticed. It was urged that upon the hearing of a summons under sub-s. 3 of s. 22 of the Act of 1890, founded upon the notice given by the urban sanitary authority or the factory inspector, the question of the necessity for, or reasonableness of, the requirements specified in such notice could be examined. That such question cannot be raised in the case of a notice of requirement given by a sanitary authority is, in my opinion, decided not only by the terms of the section itself, but by a long series of decisions referred to by the Attorney-General in reply. Upon such a summons, in my opinion, the only question which could be raised is, whether there has been a neglect or refusal to comply with such notice. Any question as to the validity of the requirements must be raised, if at all, by appeal to quarter sessions. I do not think, moreover, that the argument that there is a distinction in the case of a notice given by the factory inspector in this respect can be maintained. It was urged that because such a question would be open, in the case of proceedings taken under s. 81 of the Factory and Workshop Act, 1878, in respect of a breach of s. 35 of the Factory and Workshop Act, 1895, it ought also to

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be open in the case of proceedings taken by a factory inspector under sub-s. 3 of s. 22 of the Act of 1890. For the reasons I have given in the earlier part of my judgment I do not think this contention can prevail. I think that if a notice can be given by a factory inspector under sub-s. 2 of s. 22, it has the same effect, if not appealed against for all purposes, as a notice given by the sanitary authority. For the above reasons I am of opinion that judgment should be given for the appellant, and the case remitted to the magistrates.

My brother Darling concurs in this judgment.

GRANTHAM J. read the following judgment:—Having had the opportunity of reading my Lord's judgment, I should have been ready to accept it, and simply to agree with it; but, as I wrote my judgment last June, I think it is well I should read it, though, it having been written then in the hope of convincing some of my brothers who had not been convinced in the argument of the case, it goes more into detail than I should have thought it necessary to go at the present time.

The difficulty that has arisen in this case in determining the power of factory inspectors has been caused entirely by the system unfortunately so often adopted in the present day of legislating by reference to other Acts and by incorporation of sections of earlier Acts of Parliament.

The references backwards and forwards throughout the Acts and sections of Acts in dispute are most bewildering and perplexing, and I am not surprised that the magistrates misunderstood, as I think they did, their powers in the proceedings when the matter came before them.

If the history of the factory legislation of the nineteenth century is considered, and particularly that of the past twenty or thirty years, it will, I think, be found that the Legislature has advisedly done what it intended to do—namely, gone on step by step in its endeavour to compel the owners of factories to put them in a healthy and sanitary condition. Finding its earliest efforts often frustrated and foiled by the supineness or self-interest of the sanitary authorities, whose aid was first sought to carry out its views, the Legislature has at last

adopted more drastic measures; and as the inspectors have been, in later years at any rate, always selected for this work on account of their special qualifications for it, the Legislature as a last resort has placed the inspectors in the same position that the sanitary authorities previously occupied, and has given them power to order the necessary work to be done, and, if not done, to enforce the fines leviable for the breaches of the law in failing to obey the inspector's orders. It should not be forgotten that the experience of factory inspectors is gained by their supervision of factories over the whole of England, whereas the surveyor of the local authority in many cases has no experience of this kind whatever, and as the Legislature has given to the sanitary authority (as many legal decisions shew) the absolute discretion of determining whether work is to be done or not subject to the overriding decision of the court of summary jurisdiction, it would be strange indeed if this same power should not be confided to the more experienced inspector.

Not only is the sanitary inspector often inexperienced in the special requirements of factories to make them properly healthy and sanitary, but he is sometimes liable to be influenced by the factory owner, who is not infrequently one of the leading magistrates of the borough in which the factory is situate.

Let us see, therefore, whether the sequence of legislation does or does not bear out the views that I have thus far expressed.

The first Factory Act was passed as long ago as 1802 (42 Geo. 3, c. 73). That Act dealt not only with the morals and the religious teaching of those working in factories, but also with the hours of labour and the ventilation and light of the factory. It was, in fact, the foundation of all subsequent factory legislation. It was amended by various subsequent Acts till we come to the Act of 19 & 20 Vict., which incorporated most of the preceding Acts, and was called the Factory Act of 1856; but no sooner was that Act passed than amendments and extensions followed each other in rapid succession, until, after the passing of the Public Health Act, 1875, we

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come to the Act of 1878, which practically repealed all former Acts, and, codifying as it did the existing legislation, also enlarged the powers of the sanitary authorities, and brought more factories within the purview of the Act. Unfortunately, even in this comprehensive Act of 1878 the Legislature referred back to the Public Health Act of 1875, and incorporated some of its sections instead of making a complete Act.

The Acts now applying to this particular matter commence, therefore, with the Act of 1875, s. 38 of which is in these words: [The learned judge read the section, and continued:—]

That Act was extended by the Public Health Act of 1890, s. 22 of which is in these words: [The learned judge read the section, and continued:—]

By this 22nd section, therefore, suitable accommodation was to be provided in the way of sanitary conveniences, having regard to the number of persons employed in any factory; and the initiation of proceedings is to be on the report of the surveyor of the urban authority, which authority, by written notice, could require such additions to be made as would provide sufficient accommodation in the factory, the enforcement of their notice being by application for penalties in the usual way.

By these Acts, therefore, the local authority (that is to say, the mayor, aldermen, and burgesses in a borough like Ipswich) had power in such a factory as this, by written notice, to compel the owner or occupier for the time being to provide a sufficient number of water-closets for each sex under penalty of a heavy fine for failure to comply with the order. There was no appeal to the magistrates against this order; but, under s. 7 of the Public Health Acts Amendment Act, 1890, "Any person aggrieved by any order, determination, or requirement" of a local authority under the Act "may appeal in manner provided by the Summary Jurisdiction Acts to a court of quarter sessions."

To enforce the penalty, however, the local authority had to apply to the court of summary jurisdiction, which court had, however, as I have just said, no power to inquire into the merits of the order. By this Act, it will be noted that it was left to the surveyor to the sanitary authority to report to the

local authority, and it can well be imagined that the surveyor, an official knowing much, perhaps, of bricks and mortar and of drainage, would know but little of factory requirements; and by the time that the Act of 1878 was passed it was evident that the Legislature had found the surveyor of the local authority was not sufficiently alive to the sanitary deficiencies and requirements of factories, for by the 4th section of the Factory and Workshop Act of 1878 it is expressly provided that it shall be the duty of the factory inspector to give notice to the sanitary authority of the neglect or default in the factory. The section reads as follows: [The learned judge read it, and continued:—]

It was evidently found, therefore, that the local surveyor was remiss in giving notice or in initiating these inquiries; so he was supplanted, or, at any rate, the factory inspector was given equal powers of initiating proceedings. But it being still hoped that the local sanitary authority would see that proper sanitary requirements were provided when his attention was officially drawn by the inspector to the omission, the power to compel the owner to remedy the default was still left with the sanitary authority. It is common knowledge, however, that in many cases the local sanitary authority for various reasons declined to, or at any rate did not, act, sometimes, no doubt, because the influence of the factory owner was paramount in the borough in which his factory was situated, and sometimes from ignorance. Hence the Legislature had again to make the law more stringent, and the Factory and Workshop Act of 1891 was passed.

Sect. 2 reads as follows: [The learned judge read the section, and continued:—] In other words, it having been found that the local authority would not do its duty, the factory inspector was given an overriding authority to get the work done.

Power is given, it will be noticed, to the factory inspector to take the like proceedings as the sanitary authority might have taken where the sanitary authority had not taken proceedings within a reasonable time to remedy the default previously notified to him. To find out the powers, therefore, that the factory inspector now possesses, we have only to refer back to

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the previous Acts to see what powers the sanitary authority previously possessed. Now, by the Public Health Act of 1875 and the Factory and Workshop Act, 1878, the local authority had power to order certain work to be done, and, the order being made, the magistrates had no power of inquiring into the reasonableness or not of the order, though the court of quarter sessions had; yet it is said when the factory inspector gives the order the magistrates have power to inquire into its reasonableness. In other words, it is said that the superior authority is to have less power than the inferior. The increased powers of the inspector do not end here, however, for, the sanitary authorities having evidently excused themselves from carrying out the requirements of the inspector on the ground that a reasonable time had not elapsed to enable them to do so, an Act was passed by which they were to take these proceedings within a month instead of within a reasonable time, and, in order that they should not keep the inspectors in the dark as to their intentions, they were also bound to give notice to the inspector of the proceedings they were taking. The section reads thus: [The learned judge read s. 3 of the Factory and Workshop Act, 1895, and continued:—] What proceedings? How can it be said that "proceedings" meant or would include deliberations —deliberations perhaps resulting in the determination not to proceed? The proceedings referred to seem to me to be clearly proceedings to remedy the neglect or default—in fact, the notice to provide the required accommodation. What better language could the Legislature have adopted if it intended to give the factory inspectors the power it purports to give them, and I think did give them? Whether it gave them rightly or not is no question for us, as we have only to determine whether the power was given or not; but as it might perhaps be suggested that the Legislature could not have intended to give equal powers to the female factory inspectors as it had given to local surveyors and sanitary authorities, I may add that as their experience is gained, like that of male inspectors, from a much wider area—namely, all the factories of England—than that of the local authority, whose experience is very likely limited to the one factory in his town, their knowledge, in my judgment, is

likely to be much more valuable and reliable than that of any local authority, or of the local surveyor of any borough in England.

When the case was first argued before my brother Channell and me, I stated that I was of opinion that the order of the factory inspector was subject to the appeal to quarter sessions given to any person aggrieved by an order of a local authority, because the factory inspector has to take like proceedings as the local authority. I am of the same opinion now. But that is not the question we have to determine, which is whether or not the court of summary jurisdiction has power to inquire into the reasonableness of the order of the factory inspector. But as the question of whether "like proceedings" included the like liability to appeal to quarter sessions was not argued out as if it had been the question in dispute, I do not wish to be bound as if I had given judgment on that question.

If it was necessary to shew the reasonableness of the requirements of the inspector and the ignorance of magistrates of the usual accommodation provided in factories, I might add that by a report I have before me I find that whereas one water-closet for every seventy persons was considered by the magistrates sufficient in this case, yet in London and all the principal towns in England one in twenty to one in thirty is the minimum number provided.

With regard to the last part of sub-s. 2 of s. 2 of the Factory and Workshop Act, 1891, as to the right of recovering expenses incurred by factory inspectors in taking proceedings being limited to expenses not incurred in any unsuccessful proceeding, I do not feel the same difficulty that some of my brothers have felt. The word "proceedings" is not limited to legal or magisterial proceedings, but includes proceedings taken to remedy defaults (the same that the sanitary authority might have taken), i.e., it may include the carrying out of structural alterations or methods adopted to remedy defects under other sections of the Acts. These alterations or methods may be unsuccessful to remedy the particular defect complained of, and, therefore, it would be unfair to make the owner of the factory pay for them, and to avoid that unfairness these words

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have been, it seems to me, inserted. But as I said as to the appeal to quarter sessions, that is not the question we have to determine, and I give no opinion upon it.

For these reasons, in my judgment, the case must go back to the magistrates and their decision must be quashed, on the ground that they had no power to decide as to the sufficiency or suitableness of the accommodation.

BRUCE J. read the following judgment:—I am of opinion that the judgment of the Court should be for the appellant.

I think that the justices had no jurisdiction to hear evidence upon or to decide the question of the suitability or sufficiency of the accommodation existing in the factory. The offence charged is an offence against the provisions of the Public Health Acts Amendment Act, 1890, s. 22. One difficulty in the case arises from the circumstance that the alleged offence is an offence against the provisions contained in one of the Public Health Acts, while in order to ascertain the method of procedure to be adopted reference must be made to the provisions of the Factory Acts.

It is a little difficult to fit together the two series of enactments. But the best way of arriving at a right conclusion is to consider the various provisions one by one.

The section I have already mentioned, s. 22 of the Public Health Acts Amendment Act, 1890, is the first to be considered, and I think that the ultimate decision in the case must depend to a large extent upon the construction of that section. The section requires by its 1st sub-section that every building used as a workshop shall be provided with sufficient accommodation in the way of sanitary conveniences. The 2nd sub-section enacts that, where it appears to an urban authority on the report of their surveyor that the provisions of the section are not complied with in the case of any building, the urban authority may, if they think fit, by written notice require the owner or occupier of any such building to make such alterations and additions therein as may be required to give such suitable accommodation as aforesaid. The 3rd sub-section enacts that any person who neglects or refuses to

comply with any such notice shall be liable for each default to a penalty not exceeding 20*l.*, and to a daily penalty not exceeding 40*s.* This section is similar in terms to s. 38 of the Public Health Act, 1875, and, accordingly, it is enacted by the 4th sub-section of the section we have been considering that where that section is in force (and it is in force in the urban district in which the factory in question is situated) s. 38 of the Public Health Act, 1875, shall be repealed.

The construction of s. 22 demands consideration. I think that the written notice mentioned in the section means a notice to make such alterations and additions as may be required by the notice. The section does not, I think, point to a notice in general terms stating that the provisions of the section are not complied with, but it points to a specific notice stating the particular alterations and additions which the urban authority on the report of their surveyor require. If the notice were not a specific notice, it would be unreasonable to make a person neglecting to comply with it subject to a daily penalty, because, if the notice were only a general notice, the person to whom it was given might not know what were the requirements of the urban authority. I think that this view of s. 22 is supported by the decision of this Court in *Bogle* v. *Sherborne Local Board*. (1) That was a decision upon s. 36 of the Public Health Act, 1875. The words of that section are not the same as the words in the section now under consideration, but the general scheme of the two sections is the same. The Court held that the requirement of a written notice given under s. 36 of the Public Health Act, 1875, was conclusive upon the justices, and could only be inquired into on appeal to the Local Government Board under s. 268 of the Public Health Act, 1875. The remedy of a person who is aggrieved by any "requirement" of a local authority under the Public Health Acts Amendment Act, 1890, is given by s. 7 of that Act by way of appeal to a court of quarter sessions in cases where there is no appeal to the Local Government Board under s. 268 of the Public Health Act, 1875.

As a breach of a "requirement" under s. 22 of the Public

(1) 46 J. P. 675.

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Health Acts Amendment Act, 1890, involves penalties only, and does not involve the recovery of expenses incurred by the local authority, such as are mentioned in s. 268 above referred to, the appeal is, I think, to quarter sessions, and not to the Local Government Board.

I may observe that the very circumstance that an appeal is given to a person aggrieved by a "requirement" of a local authority seems to me to imply that such requirement is treated by the Legislature as an act in the nature of a judgment, order, or determination, which can only be called in question before the appellate tribunal.

I have not overlooked the circumstance that the 22nd section which I have been considering contemplates proceedings instituted by the urban authority on the report of their own surveyor, and not on the report of a factory inspector; and s. 38 of the Public Health Act, 1875, which was in force prior to its qualified repeal above mentioned by s. 22 of the Public Health Acts Amendment Act, 1890, was to the same effect.

In the year 1878 the Legislature, I suppose because it found the surveyors of local authorities slow to act under the powers conferred upon them by s. 38 of the Public Health Act, 1875, thought fit to confer upon an inspector of factories a power similar to that which had been conferred upon the surveyor of a local authority; and by s. 4 of the Factory and Workshop Act, 1878, it is provided that where it appears to an inspector under that Act that any act, neglect, or default in relation to any drain, water-closet, nuisance, or other matter in a factory is punishable or remediable under the law relating to public health, but not under that Act, the inspector shall give notice in writing of such act, neglect, or default to the sanitary authority in whose district the factory or workshop is situate, and it shall be the duty of the sanitary authority to make such inquiry into the subject of the notice and take such action thereon as to that authority may seem proper for the purpose of enforcing the law. Under this section the sanitary authority is authorized to take proceedings under the Public Health Act on the report of a factory inspector. What proceedings are they to take? I think s. 4 of the Act of 1878 points to a proceeding

in the nature of a written notice requiring the owner to construct such number of water-closets, earth-closets, or privies for the separate use of each sex as might be required in the notice to be given under s. 38 of the Public Health Act, 1875. That section, as I have already pointed out, is now repealed by s. 22 of the Public Health Acts Amendment Act, 1890, and it is only necessary to refer to it in order to ascertain the character of the proceedings contemplated by s. 4 of the Factory and Workshop Act, 1878. I have not critically examined s. 38 because, so far as relates to the present case, it is repealed, and is superseded by the provisions of s. 22 of the Public Health Acts Amendment Act, 1890. But I may observe in passing that, so far as the construction of s. 38 of the Act of 1875 is concerned, the observations that I made upon the construction of s. 22 of the Public Health Acts Amendment Act, 1890, seem to me to apply, that the requirement contained in the written notice mentioned in s. 38 of the Public Health Act, 1875, could not be inquired into by the justices at petty sessions. The person upon whom the requirement was made had, if ordered by the justices to pay a penalty, a right of appeal against the order of the justices under s. 269 of the Public Health Act, 1875; but whether on such appeal the reasonableness of the requirement could be inquired into is, I think, exceedingly doubtful. Probably it could not; but it is not necessary to determine that question, because it is quite clear that s. 7 of the Public Health Acts Amendment Act, 1890, gives a direct appeal from the requirement of a local authority.

So far as I have proceeded in examining the Acts of the Legislature they amount to this. By s. 38 of the Public Health Act, 1875, a local authority including an urban authority was enabled upon the report of their surveyor by written notice to require a specified number of water-closets to be constructed in a factory within their jurisdiction: that requirement, if made, was conclusive upon the justices at petty sessions, who, in the case of a breach of the requirement, had jurisdiction only to adjudicate upon the penalties to be imposed. By the Factory and Workshop Act, 1878, s. 4, the local authority

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might be set in motion by a factory inspector, in which case they were empowered to take the same proceedings as if they had been set in motion by their own surveyor; and by the Public Health Acts Amendment Act, 1890, the provisions of s. 38 of the Public Health Act, 1875, are repealed in districts in which the Public Health Acts Amendment Act, 1890, is in force, and its provisions are re-enacted in slightly different words.

Having regard to the difficulty that might arise as to whether an appeal would lie from the order of justices enforcing a penalty for breach of a requirement made by the urban authority to quarter sessions under s. 269 of the Public Health Act, 1875, an express provision was inserted in s. 7 of the Public Health Acts Amendment Act, 1890, that an appeal should lie direct from a requirement of a local authority to a court of quarter sessions. But it is to be observed that in all these cases the local authority or urban authority had a discretion as to whether they would take proceedings or not. They were bound to make inquiry; but they might if they pleased have refused to act upon the report of their own surveyor, or upon the report of the factory inspector. Apparently, in the opinion of the Legislature, the local authorities had been reluctant to act upon the report of factory inspectors in cases where proceedings ought to have been taken for punishing or remedying acts, neglects, or defaults under the Public Health Acts. Accordingly, by s. 2 of the Factory and Workshop Act, 1891, it is enacted that where notice of an act, neglect, or default is given by an inspector under s. 4 of the Factory and Workshop Act, 1878, to a sanitary authority, and proceedings are not taken within a reasonable time (that is, within one month: Factory and Workshop Act, 1895, s. 3) for punishing or remedying the act, neglect, or default, the inspector may take the like proceedings for punishing or remedying the same as the sanitary authority might have taken. What steps could the sanitary authority have taken for punishing or remedying the act, neglect, or default mentioned in the notice given by the inspector? They could have proceeded only under s. 22 of the Public Health Acts Amendment Act, 1890, by serving a written requirement upon the owner or occupier, and in the

event of the requirement not being complied with proceeding before the justices to enforce penalties. If I am right in the conclusion which I have expressed, that the written requirement of the urban authority was, subject to an appeal to quarter sessions, conclusive as to the requirements contained in it, it seems to me to follow that when the Legislature conferred upon the inspector power to take like proceedings for punishing or remedying the act, neglect, or default, the written requirement of the inspector was intended to have and does have the same force and effect as if the written requirement had been made by the urban authority. I can give no other meaning to the words "like proceedings." If the urban authority do not act within one month after notice of an act, neglect, or default is given by the inspector, then the inspector shall be armed with their powers; he is put into their place, and may take proceedings for punishing and remedying the act, neglect, or default the same in character as the sanitary authority might have taken.

Of course, the act, neglect, or default must be a real act, neglect, or default; but the question is who is to determine whether an act, neglect, or default exists, and, if it exists, how it is to be remedied. I think this power is conferred upon the factory inspector subject to the right of appeal to quarter sessions against his requirement. I think the appeal must exist from the requirement of the inspector just as an appeal might be brought from the requirement of the urban authority, if they had by written notice made a requirement. When s. 2 of the Factory and Workshop Act, 1891, enables the inspector to take the like proceedings as the sanitary authority might have taken, I think that means proceedings subject to the same conditions and the same right of appeal as proceedings taken by the sanitary authority. To hold otherwise would be to make the proceedings taken by the inspector different in character from proceedings taken by the urban authority, and to confer upon the inspector more absolute powers than those conferred upon the urban authority. The decision of the Court of Appeal in the case of *The Ganges* (1)

(1) (1880) 5 P. D. 247.

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is in point. By the County Courts Admiralty Jurisdiction Act, 1868, s. 25, it was enacted that the Court of Passage of Liverpool should, upon an Order in Council being made, have in Admiralty matters the like jurisdiction, powers, and authorities as were conferred upon the county court. No express provision was made for an appeal from the Passage Court. Yet it was held that the words "like jurisdiction" gave the same right of appeal from the Passage Court as existed from a county court in an Admiralty matter—that is, an appeal, not to the Court of Queen's Bench, but to the Court of Admiralty. I see nothing unreasonable in the construction which I think ought to be put upon the statutes. A factory inspector ought to be competent to determine such a question as the number of water-closets required for the women employed in a particular factory; and, having regard to the fact that in many urban districts owners of factories are largely represented on the borough bench, the Legislature may have had good reason for allowing the appeal to be made from the "requirement" of an inspector to the quarter sessions and not to petty sessions.

PHILLIMORE J. read the following judgment:—This case has stood for argument three times. On the first occasion it was heard by my brothers Grantham and Channell; and I believe they differed in opinion. The second hearing was before the late Lord Chief Justice, my brothers Grantham, Bruce, and Darling and myself. At the close of this argument my opinion was in favour of the respondents. As to my colleagues, I will only say this, that if I had then stood alone there would have been no necessity for a third argument.

Now, however, after the third hearing, I understand that my Lord and my brothers who with me formed the third Court are in favour of the appellant, and it is only necessary to state as briefly as I can why I still remain of opinion in favour of the respondents.

I agree with some of the contentions put forward on behalf of the appellant. I think that an urban sanitary authority can, "when it appears" to such authority, on the report of its surveyor, that the sanitary accommodation is insufficient, make

a requirement which is in substance a judgment, and which, subject to appeal to quarter sessions, is conclusive, compelling the factory owners to provide further specified accommodation under penalties; and, which is the same thing, that, upon a summons for disobedience to such a requirement, the justices have no power to inquire into the reasonableness of the requirement, but only whether it was in fact made, and whether it has or has not been complied with: 53 & 54 Vict. c. 59, s. 22. I think, further, that a factory inspector, "when it appears" to him or her—the same phrase "when it appears" being again used—may give a notice to the urban sanitary authority complaining of "any act, neglect, or default in relation to any . . . . water-closet" (41 & 42 Vict. c. 16, s. 4), and that a deficiency of water-closets is a neglect or default in relation to a water-closet, though the respondents contended otherwise; and that if the urban sanitary authority does not take within a month proceedings "for punishing or remedying the neglect or default," if neglect or default in fact there be, the factory inspector has power to make that final requirement under a penalty which the urban sanitary authority ought to have made, and in due time to issue a summons to enforce it. In conceding this last point to the argument of the appellant, I believe I am going further than a weighty authority would go. But I think upon the whole it is right.

There, however, I stop. Primarily, it is the function of the judicial tribunal upon a summons for an offence to determine upon all the elements which go to make up the alleged offence. Express words are needed to withdraw any part of the alleged offence from the determination of the tribunal. In cases under the Sanitary Acts it is often the fact that some part of the case is withdrawn from the justices and given to be decided by the sanitary authority. The Legislature has so provided, and has used apt words for the purpose, saying, not "where so and so is the case," which would leave the point to the tribunal, but "where it appears to the authority that so and so is the case," which leaves the point to the authority.

There is, however, no rule of law that in all Sanitary Acts the sanitary requirement must be left to the sanitary authority

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to determine upon. If the Legislature ceases to use apt words for the purpose, the sanitary authority does not get the power. In this very matter it is conceded that a rural sanitary authority would have no such power: 58 & 59 Vict. c. 37, s. 35.

Now, "when it appears" to the urban sanitary authority it may make a requirement, "when it appears" to the inspector he may give a notice, but when he desires to issue a requirement the condition precedent is that he shall have given notice, not of what appeared to him to be an act, neglect, or default, but of what really was an act, neglect, or default: 54 & 55 Vict. c. 75, s. 2. Again, what passes to him? The power of punishing or remedying—what? An imaginary or constructive act, neglect, or default? No. A real act, neglect, or default. If there is no such real act, neglect, or default, there is nothing to punish or remedy.

There is no trace of any provision anywhere making the opinion of the inspector conclusive, and direct legislation is required to make it so. In other words, the factory inspector can in certain circumstances make a requirement which the factory owner will neglect at his peril; but just as the inspector cannot require till he has given notice to the urban sanitary authority and waited a month, so he cannot require unless in fact there is a real act, neglect, or default; and just as he must prove his notice and his month before the justices, so must he prove the act, neglect, or default. If he does, the factory owner will be in peril, for the penalty will begin from the date fixed in the requirement, and not from the date of the conviction by the justices. This is my view after consideration of the language of the several Acts.

I may add that I venture to think this conclusion gives considerable power to the inspector, and if open to some practical objections is not so objectionable as the other. In the first place, it would be monstrous to let a single factory inspector determine such a point without appeal, more especially as he is not apparently bound to hear the factory owners before making the requirement. I understand that the majority of my colleagues agree that that would be monstrous, but think that by implication there must be an appeal from the inspector

to quarter sessions. I am glad that they so think, and I do not dissent. But, secondly, what is the use of bringing in the urban sanitary authority if it is merely to be given a chance to comply with the inspector's mandate, with the knowledge that if it does not it will be overruled and brought into contempt? And why interpose a month's delay for pure form's sake in what may be an urgent matter? If the inspector is really to determine, let him do so at once. Thirdly, I can understand that if the urban sanitary authority should be supine it may be desirable to allow some other authority to do that which no member of the public could do—namely, prosecute, and thus submit the decision to a third body, the justices. But why let the single inspector overrule the whole sanitary committee and its surveyor? Again, there may be reasons for giving less power to a rural than to an urban sanitary authority; but the inspector is the same inspector in rural as in urban districts. In a rural district he, even if he acts with the rural sanitary authority, cannot decide; he can only prosecute. In urban sanitary districts he is to be allowed to decide, and to do this by overruling the apparently more important body. Upon the whole I should conclude in favour of the respondents, and say that the justices were right in admitting evidence to shew that there was, in fact, no neglect or default on the part of the factory owners.

Appeal allowed. Case remitted to justices.

Solicitor for appellant: *The Solicitor to the Treasury.*

Solicitor for respondent: *Percy Gates, for G. C. Bantoft, Ipswich.*

A. P. P. K.

1900
Dec. 20.

[CROWN CASE RESERVED.]

THE QUEEN *v.* KANE.

Criminal Law—Fraudulent Misappropriation by Agent—"Banker, Merchant, Broker, Attorney, or other Agent"—Larceny Act, 1861 (24 & 25 *Vict.* c. 96), s. 75.

By 24 & 25 Vict. c. 96, s. 75, "Whosoever, having been intrusted, either solely, or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any money or security for the payment of money, with any direction in writing to apply, pay, or deliver such money or security or any part thereof respectively, or the proceeds or any part of the proceeds of such security, for any purpose, or to any person specified in such direction, shall, in violation of good faith, and contrary to the terms of such direction, in anywise convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such money, security, or proceeds, or any part thereof respectively . . . . shall be guilty of a misdemeanour."

The prisoner, a conjuror and thought-reader, received from the prosecutrix a cheque for the specific purpose of paying a deposit upon an application on behalf of the prosecutrix for shares in a certain railway company, the cheque to be returned to the prosecutrix in the event of the shares not being obtainable. The prisoner made no application for the shares, but cashed the cheque and misappropriated the proceeds:—

Held, that the words "or other agent" in s. 75 applied only to persons whose occupation was similar to those enumerated in the section, and did not include any ordinary agent who might from time to time be intrusted with chattels or valuable securities, and that the facts disclosed no offence within the meaning of the section.

Reg. v. *Portugal*, (1885) 16 Q. B. D. 487, approved and followed.

CASE stated by Ridley J.

The prisoner was tried at the Central Criminal Court upon an indictment containing four counts, charging him in the first count for that he, having been intrusted as an agent by Elizabeth Mary Williamson with a certain security for the payment of money, to wit, an order of payment of the sum of 60*l.*, with a certain direction in writing to apply such security to a certain purpose specified in such direction, to wit, for the application for sixty shares in the Baker Street and Waterloo Railway Company, unlawfully, in violation of good faith and contrary to the terms of such direction, did convert such security

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to his own use and benefit, contrary to the provisions of the first branch of s. 75 of the Larceny Act, 1861. The other three counts of the indictment varied the charge by describing the thing converted to be "the proceeds of such security," and the conversion to be "to the use and benefit of a person other than the said Elizabeth Mary Williamson."

The prisoner was stated to be a conjuror and thought-reader, and in November, 1900, he made the acquaintance of the prosecutrix at a hotel where they were both staying. On November 13, about 2.30 P.M., he called her attention to an advertisement relating to the Baker Street and Waterloo Railway Company, in which he said he was himself going to invest, and that it was a safe thing and would pay good interest. He further said that he was going to apply for sixty shares for himself, and advised the prosecutrix to make an application for a similar number. The prosecutrix got her cheque-book, and in the prisoner's presence wrote out a cheque for 60*l.* payable to L. Kane or order. Whilst the prosecutrix was writing the cheque the prisoner asked her not to cross it, as he said the application list closed that afternoon, and it was necessary to pay cash with the application in order to secure the shares. Upon these representations the prosecutrix handed the cheque to the prisoner, and on the same afternoon asked him for a receipt for the 60*l.* represented by the cheque, when the prisoner wrote out and signed a receipt in the following words: "Received of Mrs. Williamson 60*l.* for the application of sixty shares in the Baker Street and Waterloo Railway, to be returned if those shares are not obtainable." On this document was a receipt stamp, which was cancelled by the prisoner.

It was proved that the prisoner made no application for the shares in the company, and that he had himself cashed the cheque across the counter at the branch of the bank on which it was drawn at or about 3 o'clock on the same day, and that he used the proceeds for purposes of his own. The substantial question raised at the trial was whether the document signed by the prisoner, taken together with the cheque given to him by the prosecutrix, was such a direction in writing as to bring

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the offence of the prisoner within the first part of s. 75 of the Larceny Act.

On the part of the prosecution it was contended that the prisoner was an agent, but no case was cited in support of this contention; it was further contended that, if the cheque signed by the prosecutrix and the document signed by the prisoner were taken together, or even if the document signed by the prisoner stood alone, there was such a direction in writing as to bring the prisoner's offence within the first part of s. 75 of the Larceny Act, and in support of this contention the case of *Reg.* v. *Christian* (1) was cited.

On the part of the prisoner it was contended that the document signed by the prisoner, whether it was read with or apart from the cheque signed by the prosecutrix, constituted no such direction in writing as to bring the case within the first part of s. 75 of the Larceny Act, and in support of this contention the cases of *Reg.* v. *Brownlow* (2) and *In re Bellencontre* (3) were cited.

The learned judge left the case to the jury, directing them that the prisoner was an agent, and that the document signed by the prisoner was a sufficient direction in writing, whether taken with or apart from the cheque drawn by the prosecutrix, to satisfy the requirements of the section. The jury found the prisoner guilty, adding, in answer to a question put by the learned judge, that the document signed by the prisoner was an intrinsic part of the transaction for which he received the cheque. The prisoner was released on bail and the present case stated.

If the Court was of opinion that the prisoner was an agent within the first part of s. 75 of the Larceny Act, and that the documents above referred to constituted such a direction in writing as was required by the first part of that section, the conviction was to stand; otherwise it was to be quashed.

Charles Mathews, for the prosecution. It is admitted that the conviction cannot be supported. From *Reg.* v. *Portugal* (4),

(1) (1873) L. R. 2 C. C. 94.
(2) (1878) 14 Cox, 216.
(3) [1891] 2 Q. B. 122.
(4) 16 Q. B. D. 487.

which was not cited at the trial, it is clear that the prisoner was not an agent within the meaning of the section. To be within the section a man must carry on the business of an agent; a mere casual agency is insufficient.

Travers Humphreys, for the prisoner, was not called upon.

LORD ALVERSTONE C.J. We have all considered the case of *Reg.* v. *Portugal* (1), and, though that decision is not technically binding on this Court, we think that we ought to follow it. The section does not apply to any person who happens to act on behalf of another; it applies only to agents of the class indicated in the preceding words of the section. If our decision had not proceeded on this ground, there would have been a substantial point raised by the present case well deserving of argument.

BRUCE J. I agree.

RIDLEY J. I am of the same opinion. I would add that I regret that my attention was not called at the trial to the case of *Reg.* v. *Portugal.* (1)

BIGHAM and DARLING JJ. concurred.

Conviction quashed.

Solicitor for prosecution: *Solicitor to the Treasury.*
Solicitors for prisoner: *Osborn & Osborn.*

(1) 16 Q. B. D. 487.

W. J. B.

C. A.
1901
Jan. 18.

[IN THE COURT OF APPEAL.]

In re J. G. TOMKINS & CO.

Bankruptcy — Petition — Limited Company — Presentation of Petition by "Officer" of the Company—Clerk—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 148.

Any person bonâ fide chosen by a limited company and duly authorized under seal to be their agent for the signing and presentation of a petition in bankruptcy, thereby becomes an "officer" of the company for that purpose within s. 148 of the Bankruptcy Act, 1883, which provides that for all or any of the purposes of the Act "a corporation may act by any of its officers authorized in that behalf under the seal of the corporation." Thus a clerk in the employ of the company so authorized, though not in the ordinary sense an "officer," may sign a bankruptcy petition.

On September 22, 1900, Eastwood & Co., Limited, presented a bankruptcy petition against J. G. Tomkins & Co. in respect of a judgment debt of 76*l.* 5*s.* 4*d.* The acts of bankruptcy alleged by the petition were that executions had been levied by seizure and sale of the goods of the debtors under two writs of fi. fa., which goods were sold by the sheriff on July 11 and 20, 1900. The petition was signed "For Eastwood & Company, Limited: Henry J. Byrne, duly authorized under the seal of the company." Henry J. Byrne was a clerk in the employ of the company, and assisted in the secretarial work; and by a resolution of the directors passed on November 10, 1892, he was authorized under the seal of the company to take all necessary steps in bankruptcy against debtors to the company on behalf of the company. At the hearing of the petition before the registrar on November 22, 1900, the objection was taken that Byrne was not an officer of the company within s. 148 of the Bankruptcy Act, 1883, which provides that for all or any of the purposes of the Act "a corporation may act by any of its officers authorized in that behalf under the seal of the corporation." The registrar found as a fact that Byrne was not an "officer" of the company within the section, and ordered that the petitioning creditors should be

at liberty to amend the petition by authorizing an officer of the company under seal to execute it, notwithstanding that the acts of bankruptcy therein recited would not have been available for a fresh petition. The debtors appealed against this order.

H. T. Kemp, for the debtors. The registrar had no jurisdiction to allow the amendment of the petition at all, for it was presented by an unauthorized person. Under s. 148 of the Bankruptcy Act, 1883, a petition on behalf of a corporation must be presented by one of its "officers" authorized to do so under seal. Here Byrne was not an "officer" of the company, and so the registrar has found as a fact. When the petition came on for hearing on November 22, 1900, and the registrar allowed it to be amended, the petition thereby became a fresh petition, but the acts of bankruptcy had been committed more than three months previously, and were therefore not available for a fresh petition: Bankruptcy Act, 1883, s. 6, sub-s. 1 (*c*). Accordingly, the petitioners must fail. A petitioning creditor must, in order to sustain his petition, be the actual owner of the debt that is the subject of the petition. A trustee of the debt cannot present a petition; and if it is presented by a person not entitled to do so, the general practice is to dismiss it without any leave to amend: *Ex parte Culley, In re Adams* (1); *In re Ellis, Ex parte Hinshelwood* (2); *Ex parte Dearle, In re Hastings.* (3) In any case the Court will not give leave to amend a petition after three months from the act of bankruptcy relied upon: *In re Maund, Ex parte Maund.* (4)

P. M. Francke (*A. H. Carrington* with him), for the petitioning creditors. Sect. 148 does not say that a corporation "shall" act by any of its "officers," but only "may" do so. The section, therefore, does not preclude a company from acting by any person duly authorized. Rule 258 of the Bankruptcy Rules, 1886, 1890, that a bankruptcy petition against a debtor to a company authorized to sue and be sued in the name of a public officer or agent of such company may be

(1) (1878) 9 Ch. D. 307.
(2) (1887) 4 Mor. 283.
(3) (1884) 14 Q. B. D. 184.
(4) [1895] 1 Q. B. 194.

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presented by such public officer or agent as the nominal petitioner, does not apply to an incorporated company such as this, but only to an unincorporated company: *In re Collier, Ex parte Dan Rylands, Limited.* (1) But this petition really needed no amendment, for Byrne was a servant or officer of the company duly authorized. He was not the less an "officer" because he was a clerk, though it appears he performed something more than the ordinary duties of a clerk, for he assisted in doing the secretarial work. No doubt the practice is for an incorporated company to present a bankruptcy petition by its secretary: *In re Whitley, Ex parte Mirfield Commercial Co.* (2); but there is no rule that the secretary must of necessity be the person to present the petition. But in any case the defect, if any, here was a merely formal one; it could not mislead anybody, and might, therefore, be amended under s. 143 of the Act: *In re Collier, Ex parte Dan Rylands, Limited.* (1) *In re Maund, Ex parte Maund* (3) differs from this case. There it was proposed to amend the petition by adding new petitioners with new debts. But the observation on p. 198, to the effect that the Court will give leave to amend if within the three months a debt has been made the ground of the petition, and it becomes desirable to add another party to the petition in respect of that debt, is in favour of the petitioning creditors.

Kemp, in reply, referred to *Ex parte Kirkwood, In re Mason* (4) as to giving leave to amend a petition, and to Form 72 to the Bankruptcy Rules, 1886, 1890, as to the distinction between a "clerk" and an "agent" of a company.

RIGBY L.J. In this case the amendment to the petition made by the registrar has been objected to on the ground that according to the true construction of s. 148 of the Bankruptcy Act, 1883, it is necessary that any person appointed to present a petition in bankruptcy on behalf of a company must be an officer of the company, and that here there was no officer of the company at the time when the petition was originally

(1) (1891) 8 Mor. 80.
(2) (1891) 8 Mor. 149.
(3) [1895] 1 Q. B. 194.
(4) (1879) 11 Ch. D. 724.

presented, and that there ought not now to be any substitution of the company's officer. In the view I take of this case it is not of primary importance to go into the question of amendment at all. I do not think that the Legislature by s. 148 intended to impose upon a limited company the task of appointing a person who within any recognised definition of the term must be an officer of the company. No doubt when we are dealing with other enactments, such as those relating to applications to make an officer of a company liable, it may be necessary to determine what is meant by an "officer," and who is an officer; but, in my opinion, any person bonâ fide chosen by a company to be their agent for the presentation of a petition in bankruptcy becomes thereby an officer of the company for the purpose. Accordingly, the person who was originally nominated by the company in this case, though only a clerk of the company, and not in any ordinary sense an officer of the company before he was appointed under the seal of the company, became thereby, sufficiently for the purposes of the Act, an "officer" of the company to present this petition. It follows that the petition was a good petition from the first, and did not require amendment, and that the application to amend was misconceived and unnecessary. It follows, also, in my opinion, that the registrar was mistaken in his view of the practice and that the amendment ought not to have been made. Under these circumstances the debtors come and complain of the amendment. Suppose the amendment was wrong, what good would they get by that? Nothing. The petitioners do not say that the amendment was necessary: they say that the petition was good without any amendment. I think that on that ground we may say that the amendment was unnecessary and may be disregarded. But with regard to costs, it appears to me that both parties are wrong to a certain extent—the debtors in putting a strained construction upon s. 148, which we do not accept, and the petitioning creditors in having insisted upon an amendment which was not necessary. There will, therefore, be no costs of the appeal. The petition, having been a good petition from first to last, will come before the registrar in the ordinary course, and he

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will proceed upon it as a good petition. The appeal will be allowed without costs.

VAUGHAN WILLIAMS and STIRLING L.JJ. concurred.

Appeal allowed.

Solicitors: *C. Robinson & Co.; H. P. Davies.*

G. I. F. C.

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[IN THE COURT OF APPEAL.]

In re CRONMIRE. *Ex parte* CRONMIRE.

Bankruptcy—Proof of Debt—Husband and Wife—Bankruptcy of Husband—Wife Surety for Husband's Debt—Payment of Debt by Wife—Right of Exoneration—Money Lent by Wife to Husband—Onus of Proving whether Lent for purpose of Husband's Business—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 3.

A wife at the request of her husband (a trader) deposited with his bankers the title deeds of her separate real estate as security for advances to be made by them to him for the purpose of his business. The bankers made advances to him on the security of the deeds and a memorandum of deposit signed by the wife. She afterwards paid off his debt to the bankers. After his death an order was made for the administration of his estate in bankruptcy:—

Held, that s. 3 of the Married Women's Property Act, 1882, did not apply, and that the wife was entitled to prove against the estate for the amount which she had paid to the bankers, with interest thereon.

The wife also lent a sum of money to her husband, and she claimed to prove against his estate for that sum. She did not in her affidavit say that the loan was not made for the purpose of the husband's business, and the trustee of the estate adduced no evidence that it was made for that purpose, and he did not cross-examine the wife.

Held, that the proof ought to be admitted.

Per Vaughan Williams L.J.: *In re Genese*, (1885) 16 Q. B. D. 700, must not be understood as a decision that s. 3 of the Married Women's Property Act, 1882, in every case throws on a wife who is claiming to prove in her husband's bankruptcy for money lent by her to him the onus of shewing that the loan was not made for the purpose of his business.

APPEAL by the widow of Ashley A. H. Cronmire, deceased, whose estate was being administered in bankruptcy under

s. 125 of the Bankruptcy Act, 1883, against the affirmance by Wright J. of the rejection by the trustee of the estate of a proof tendered by her.

One of the items in the proof was thus described by Mrs. Cronmire in an account annexed to her affidavit of proof dated May 25, 1900:—

"Deponent's equity of exoneration in respect of liability incurred by her and her separate estate for 1100*l.* advanced by the Capital and Counties Bank to" her husband "and applied by him for his own purposes, and interest thereon, upon the security of the deposit by the deponent at the request of her husband with the bank of the title deeds to certain portions of her separate estate, viz., two freehold houses at Forest Gate, and subsequently in respect of a mortgage thereof by the deponent at the request of her husband to Joseph Bruton for 1800*l.*, the advance by the bank being paid off thereout—1800*l.*, less 100*l.* received by the deponent out of the mortgage advance of 1800*l.* Interest thereon paid by the deponent quarterly out of her separate estate at 5 per cent. per annum (less tax) up to March, 1900—267*l.*"

The trustee rejected the proof on September 25, 1900, on the ground (inter alia) that all claims and demands by Mrs. Cronmire against the estate of her husband were settled by an order made by Kekewich J. in the Chancery Division on July 19, 1899, in an action by the trustee against her.

In a further affidavit made by Mrs. Cronmire on October 27, 1900, she said that on July 28, 1896, at her husband's request, she handed the title deeds of her Forest Gate houses to Mr. Pugh, the managing clerk of her husband's then solicitors. Mr. Pugh brought a note from her husband to her, and informed her that her husband required to obtain a temporary loan for two or three weeks for the purpose of his business, and wished her to hand to Mr. Pugh the deeds of her said properties to deposit with her husband's bankers. She at first objected to hand over her deeds, and only did so upon Mr. Pugh's distinct promise on her husband's behalf that they should be returned to her within three weeks. About the following day she received a note from her husband, and went

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to his bankers, the Capital and Counties Bank, where she signed a memorandum of deposit and charge in respect of the said deeds. She added: "In this matter I acted only as surety for my husband in creating the security, and looked to him for exoneration accordingly. The advances by the bank upon the security were made to my husband and applied by him for his own purposes, and I never received any part thereof."

Mrs. Cronmire further said that on December 21, 1896, the bank were paid off the sum of 1100*l.* (the amount they had advanced to her husband upon the security) in discharge of the equitable charge created by the memorandum and deposit. The 1100*l.* was paid off out of an advance of 1800*l.* at 5 per cent. per annum made by Joseph Bruton upon a mortgage to him of her Forest Gate houses. This mortgage she executed at her husband's request and for his sole benefit, and he received the balance of the advance (except the sum of 100*l.* which she received) after satisfying the bank the 1100*l.* (which was paid by Bruton direct to the bank), and her husband applied the money so received by him for his own purposes. In order to preserve her own property, Mrs. Cronmire said that since the date of the mortgage she had duly and regularly paid the interest thereon quarterly (less tax).

Mrs. Cronmire did not prove that the 600*l.* which her husband thus received was not lent to him for the purpose of his business, and the trustee did not adduce any evidence that the money was lent to the husband for that purpose, and he did not cross-examine Mrs. Cronmire on this point.

Wright J. affirmed the rejection of the proof on the ground on which, as above stated, the trustee had rejected it.

Mrs. Cronmire appealed.

Herbert Reed, Q.C., and *Muir Mackenzie*, for the appellant. On the true construction of the order of July 19, 1899, it does not apply to the proof for 1700*l.* As regards the 1100*l.* the wife, having as surety for her husband paid his debt out of her own property, is entitled to be exonerated by him, and is therefore entitled to prove against his estate for the amount

which she has paid: *Huntingdon* v. *Huntingdon.* (1) Sect. 3 (2) of the Married Women's Property Act, 1882, does not apply. The wife did not lend the money to the husband, nor did she intrust her property to him. The bank advanced the money, and she intrusted her property to them as security for the advance.

As to the 600*l.* which the wife lent to the husband, there is nothing to shew that it was lent to him for the purpose of his business.

Robson, Q.C., and *R. J. Willis*, for the trustee. The subject of this proof was included in the order of July 19, 1899. But, if it was not, s. 3 of the Act of 1882 prevents the wife from proving for the 1100*l.* until the other creditors for value of the husband have been paid. The 1100*l.* was admittedly lent to the husband for the purpose of his business, and in substance it was lent by the wife, and her property was intrusted to him. If this transaction does not come within s. 3 it will be very easy to evade its provisions.

As to the 600*l.* the onus is on the wife to shew that the money was not lent to the husband for the purpose of his business, and she has not shewn this: *In re Genese.* (3)

H. Reed, Q.C., in reply. Sect. 3 does not affect the right of the wife to prove for the amount of her husband's debt which she has paid: *Alexander* v. *Barnhill* (4); *Mackintosh* v. *Pogose.* (5) As to the 600*l.* the onus must be on the trustee who seeks to cut down the right of proof. Sect. 3 says nothing about the onus of proof. *In re Genese* (3) depended on the particular facts of the case, and is not a decision upon the construction of s. 3. That section does not apply to money lent by a wife to a husband for any other purpose than that of his business:

(1) (1702) 2 B. P. C. 1.

(2) By s. 3, "Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate, after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied."

(3) 16 Q. B. D. 700.

(4) (1888) 21 L. R. (Ir.) Ch. D. 511.

(5) [1895] 1 Ch. 505.

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In re Clark (1); nor to money lent to a partnership firm of which the husband is a member as regards proof against the joint estate of the firm: *In re Tuff.* (2)

RIGBY L.J. (after referring to other items in the proof) continued:—As regards the Forest Gate property, the claim is to prove for 1700*l.* The husband applied to his wife to allow her title deeds to be deposited with his bankers as security for a loan to be made by them to him, and 1100*l.* was advanced to him by the bankers on that security. On that occasion there was no question of a loan by the wife to the husband, or of intrusting her property to him—that is, handing it over to him to deal with it as he might think fit, but the 1100*l.* was advanced by the bankers on the security of the wife's Forest Gate property. In that transaction the wife no doubt stood in the position of a surety or quasi surety to the bankers for her husband's debt. At a subsequent date she raised a sum of 1800*l.* on a mortgage of the property. As regards the 1100*l.*, she, out of the 1800*l.* the proceeds of the mortgage, paid off the bank, and she has a right to be treated as having the bank's security and a right to exoneration by her husband which, under the circumstances, gives her a right to prove for 1100*l.* and interest against her husband's estate. But, as regards the balance of the 1800*l.*, the matter requires to be further considered. She admitted that she received 100*l.* of the balance herself, and therefore that sum is out of the question. There remains the sum of 600*l.*, which in some way got into the hands of the husband. The husband and his advisers do not appear to have been very careful in explaining the matter to the wife. He did not say that he wanted the money for the purpose of his business, or anything to that effect, and it seems to have been suggested on one occasion that it was only a substituted security for the purpose of paying off an existing debt for which the estate was already liable. At any rate I cannot, under the circumstances, come to any other conclusion than that the money came to the hands of the husband without the wife being made aware that it was to be used for the

(1) [1898] 2 Q. B. 330. (2) (1887) 19 Q. B. D. 88.

purpose of his business. As a matter of construction, there is nothing in s. 3 of the Married Women's Property Act to shew that the wife is bound to prove that the money was not advanced for the purpose of the husband's business. That onus would only arise under peculiar circumstances, and I cannot see any such circumstances here. In my opinion, therefore, the wife is entitled to proceed with her proof, and it was wrongly rejected as regards the 1700*l.*

VAUGHAN WILLIAMS L.J. I agree. I desire only to add a word about *In re Genese* (1), because the point may arise again in practice. I do not believe that Cave J. had any intention of resting his decision in that case upon the construction of s. 3 of the Married Women's Property Act, 1882. I believe that all he intended to say was this: When anyone claims to prove in bankruptcy he must of course shew a primâ facie case, and, having regard to the facts of that case, the learned judge thought that the primâ facie inference was that the money lent by the wife to the husband was lent to him for the purpose of his business. In my opinion the learned judge had no intention of saying that, according to the true construction of s. 3, it threw on the wife in every case the obligation of proving that the money was not lent to the husband for the purpose of his business.

STIRLING L.J. I agree. As regards the 1100*l.*, the wife, being in the position of a surety for her husband's debt, redeemed the security, which was on her own property, by paying off the bank. She claims to be entitled to stand in the same position as the bank would have stood if they had not been paid, and to prove against her husband's estate without deducting the value of the security. As the security was upon the wife's own property and not upon her husband's, the bank would have been entitled to prove. So I think she is entitled to make this proof, and I fail to see how her right is excluded by the arrangement made in the Chancery action.

As to the balance of 600*l.*, the question is whether the proof

(1) 16 Q. B. D. 700.

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ought not to be postponed to the other creditors for value by reason of s. 3 of the Married Women's Property Act, 1882. I agree that, whatever may be the general rule with reference to the burden of proof in such a case, there is no evidence that the wife knew for what purpose the advance was wanted, and there is some evidence that the advance was made by the wife upon a representation that the transaction in question was not an assigning away of her property, but was simply for the purpose of paying off the charge in favour of the bank. If it is alleged that the 600*l.* was to be placed in the hands of the husband for the purpose of the business, I think it was for the trustee in bankruptcy to inquire into that when he had an opportunity of cross-examining the wife. He did not do this, and in my opinion we cannot come to the conclusion that the 600*l.* was advanced for the purpose of the business.

Appeal allowed.

NOTE.—Vide *Paget* v. *Paget*, [1898] 1 Ch. 470, 474; *Gleaves* v. *Paine*, (1863) 1 D. J. & S. 87, 95.

Solicitors: *Duffield, Bruty & Co.; Lumley & Lumley.*

W. L. C.

[IN THE COURT OF APPEAL.]

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Jan. 17.

McINTOSH *v.* SIMPKINS.

County Court—Jurisdiction—Application for Judgment Summons—Form of Affidavit—Insufficiency of Affidavit—Prohibition—County Court Rules, 1889, *Order* XXV., *rr.* 13, 14*a*, *Appendix H.*, *Form* 52A.

An affidavit, in support of an application for leave to issue a judgment summons out of the district of the county court in which judgment had been obtained, stated that the defendant lived in a house apparently of the yearly value of 60*l.*, and carried on business as a builder, but it did not state any circumstances shewing that the business was profitable, or that the defendant had means to pay, nor did it state whether the defendant was married, and if so whether he had children. The county court judge gave leave to issue the summons. On an application for a writ of prohibition:—

Held, that the affidavit was not in accordance with Form 52A of Appendix H to the County Court Rules, 1889, and was therefore insufficient to give the county court judge jurisdiction under Order XXV., r. 14*a*, of those rules.

APPEAL from the judgment of a Divisional Court reversing an order of a judge at chambers granting a writ of prohibition, directed to the judge of the Croydon County Court.

The plaintiff recovered judgment in the county court for a sum of 4*l.* 10*s.*, and applied to the judge for leave to issue a judgment summons. The defendant did not dwell or carry on business and was not employed within the district of the Croydon County Court, and the application was therefore made under Order XXV., r. 14*a*, of the County Court Rules, 1889, which directs that "where a debtor does not dwell or carry on business and is not employed within the district of the court in which the judgment was obtained, the summons shall not be issued from that court without the leave of the judge. The application for leave shall be made upon affidavit according to the form in the appendix, and leave shall not be granted unless the judge is satisfied that the evidence afforded by such affidavit, if uncontradicted, would justify the making of an order of commitment against the debtor." The form referred to, 52A of Appendix H, so far as is material to this

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case, is as follows: "(3) The defendant, C. D., now lives at in a house (*or* shop) apparently of the yearly rent or value of *l.* (4) (If a master) The defendant, C. D., carries on the business of a (*state what*) in a (*state what*) at (*state where and any circumstances shewing that the business is profitable or that he has means to pay*); (5) the defendant, C. D., is unmarried [*or* is married and has (*state how many*) children, of whom (*state how many*) work and earn wages.]"

The affidavit made in support of the application gave the necessary particulars as to the judgment, and stated that the defendant was not at the date of the entry of the plaint living or carrying on business within the jurisdiction of the Court. It further stated that the defendant lived in a house the position of which was described, and which was said to be apparently of the yearly value of 60*l.*, and it further stated that the defendant carried on the business of a builder. No further particulars were given. The county court judge gave leave to issue a judgment summons. When the summons came on for hearing, objection was taken on behalf of the defendant that the affidavit was insufficient, as it was not according to the form, but omitted particulars which the form shewed should have been stated, and that the judge had no jurisdiction to entertain the application for leave to issue a judgment summons or to hear the summons. The judge overruled the objection. Evidence was then given on behalf of the plaintiff that the defendant was living in a house apparently of the yearly value of 60*l.*, and that he was a builder or builder's foreman, and employed workmen, and the county court judge made an order of commitment. On an application at chambers, Bucknill J. granted a writ of prohibition restraining further proceedings. The Divisional Court (Lawrance and Kennedy JJ.) reversed the decision of the judge at chambers.

The defendant appealed.

W. G. Clay, for the defendant. The rule makes it clear that, to give the judge jurisdiction to issue a judgment summons, there must be an affidavit in the form given in the appendix. The affidavit in this case does not follow the form, for it omits

to state circumstances shewing that the defendant's business was profitable, nor does it state whether the defendant is married, and, if so, whether he has children dependent on him. [He referred to *Ex parte Koster*. (1)]

W. Whateley, for the plaintiff. It is not necessary that the affidavit should follow the form in every respect; if it is "according to the form," and discloses all the facts known to the deponent, it is for the judge to determine on its sufficiency. The affidavit made out a primâ facie case of means to pay this small debt, or a least some part of it: *Ex parte Fryer* (2); and the judge had jurisdiction to grant leave to issue the summons, and to adjudicate on it. [He also referred to *Chard* v. *Jervis*. (3)]

A. L. Smith M.R. The question in this case is whether the defendant, a judgment debtor, can be committed for non-payment of a debt. The defendant was a builder, and it is apparent from the documents before us that the plaintiff was a carter, employed by the defendant to cart building materials, for which the defendant became indebted to the amount of 4*l*. 10*s*. Judgment was recovered in the Croydon County Court; but the money was not paid. The defendant resided out of the jurisdiction of the Croydon County Court, so the plaintiff took proceedings under Order xxv., r. 14*a*, of the County Court Rules, 1889, to obtain a committal order. By Order xxv., r. 13, no order of commitment under the Debtors Act, 1869, is to be made except on a judgment summons served upon the judgment debtor, and by rule 14*a* of the same order, where the debtor does not dwell or carry on business and is not employed within the district of the Court in which the judgment was obtained, the application for leave for a judgment summons to issue out of the jurisdiction must be made upon an affidavit, according to the form in the appendix, and leave is not to be granted unless the judge is satisfied that the evidence before him, if uncontradicted, would justify a commitment. The form of the affidavit is given in Appendix H, 52A,

(1) (1885) 14 Q. B. D. 597. (2) (1886) 17 Q. B. D. 718.
(3) (1882) 9 Q. B. D. 178.

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and it is evidently intended to enable the judge to know what are the responsibilities of the person whom he is asked to commit. The deponent must state where the defendant lives, and the apparent yearly rent or value of the house or shop. He must state, in cases in which the defendant is a master who carries on business, what the business is, in what it is carried on, at what place, and "any circumstances shewing that the business is profitable or that he has means to pay." He must also state whether the defendant is unmarried, or is a married man with children, and, if so, how many, and whether they earn wages. The affidavit must substantially follow all these provisions. This affidavit states that the defendant lives in a house of the apparent value of 60*l.* a year, and that his business is that of a builder; but it does not contain any other of the particulars mentioned in the form in the schedule. Apart from the question of the requirements of the rule as to the affidavit, if the point were whether there was evidence on which the county court judge could imply that the defendant was able to pay some part of the debt, speaking for myself I should have drawn the inference that he was able. But that is not the point before us. The point taken is that the affidavit in material particulars is defective in that it does not give any circumstances shewing that the business is profitable or that the defendant has means to pay, and that it does not state whether the defendant is married or unmarried, or anything about children, so as to shew the debtor's obligations. In my opinion the proceedings founded on this affidavit were wrong ab initio, and on that ground the prohibition granted by Bucknill J. at chambers ought to stand, and the order of the Divisional Court should be set aside.

COLLINS L.J. I am of the same opinion. The rule, as has been pointed out, under which the application for a judgment summons was made, is Order XXV., r. 14*a*. Under that rule the affidavit is to be according to the form in the appendix, and in the form referred to are contained provisions which are intended for the protection of the defendant in cases in which he does not dwell or carry on business and is not employed within the district in which the judgment was obtained. By

the express terms of the rule the judge must be satisfied that the evidence afforded by the affidavit, if uncontradicted, would justify the making of an order of commitment against the debtor. We are not entitled to approach this case as if there were no provision enacting that an affidavit in a particular form should be the foundation of the proceedings. To say that the question is merely, and apart from the statutory conditions, whether a primâ facie case is made out would be to strike out these safeguards in the case of a debtor against whom it is proposed to put in force the provisions of the Debtors Act, 1869. I do not suggest that the affidavit must technically and literally follow the form given, but there are certain cardinal matters, and it is a condition precedent to the granting of leave that the affidavit should follow the form in respect of those matters. The affidavit must not omit the matters which are specified in the form. Applying that principle to the present case, we find it stated in the affidavit that the defendant occupies a house of the apparent value of 60*l.* a year, and that he is a builder. I do not think that those two facts taken alone would afford evidence which, if uncontradicted, would justify the making of an order of commitment. We must, however, look not merely to what is stated, but also to what is left out, because, if it were possible to draw an inference of means from the two statements that are made, that inference would be modified and weakened by silence on points on which the rule invites a statement. The form by paragraph 4 requires a statement that the business is profitable, or that the defendant has means to pay, and if the plaintiff desires that the inference should be drawn that the defendant has means to pay, this would be the place to state, for instance, that the defendant is owner or tenant of the house he occupies, or to state other circumstances shewing means to pay. The rule enacts that special topics are to be dealt with by a plaintiff who desires to obtain leave, in such a case as the present, to issue a judgment summons, and the plaintiff has not made such an affidavit as is essential to give the judge jurisdiction. There was consequently no such evidence before the judge as brought the case within Order xxv., r. 14*a*.

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Romer L.J. I also think that this appeal should be allowed. We have to bear in mind that the form in the schedule is but a form, and is adaptable to the circumstances of each case as it arises, but it must nevertheless be adhered to in substance. The form shews that it is essential to bring before the county court judge certain facts bearing on the ability of the defendant to pay. For instance, it is not sufficient merely to state where the defendant lives, and the rental value of the house in which he lives, and that he carries on a business. It is clearly contemplated in the case of a defendant carrying on business that some circumstances should be stated shewing that it is profitable, or that the defendant has means to pay. Means cannot be inferred from mere residence in a house and mere carrying on a business. Further, there is the provision as to the family of the defendant. I do not say that it is essential that the judgment creditor should be acquainted with the facts as to the family of the judgment debtor—I can conceive that a judgment summons might be obtained though the judgment creditor was not able to say whether the judgment debtor was married and had children—but I think that it must be assumed, in the absence of any statement to the contrary, that the judgment debtor has family obligations. It cannot be gathered from the affidavit that the business is profitable, or that the defendant has means to enable him to pay a substantial part of the judgment debt, subject to the obligation he is under to support his wife and family. The affidavit does not meet the conditions laid down in the form, and affords no evidence which would justify the county court judge in making an order of committal. If so, the condition on which the judge could exercise the power given by the rule was wanting, and the prohibition granted at chambers ought to stand.

Appeal allowed.

Solicitor for plaintiff: *William Hood, Croydon.*
Solicitor for defendant: *W. H. Sturt.*

A. M.

Note.—See *Lumley* v. *Osborne*, post, p. 532.

STOKES, APPELLANT *v.* HILL, RESPONDENT.

1901
Jan. 28.

Mine—Coal Mines Regulation Acts—Abandonment—Notice to Secretary of State—Neglect to send—Offence against Act—Limitation of Time—50 & 51 Vict. c. 58, s. 38, sub-s. 5—59 & 60 Vict. c. 43, s. 4.

The respondent was charged, as owner of a mine, with failing to comply with the Coal Mines Regulation Act, 1887, s. 38, as amended by the Coal Mines Regulation Act, 1896, s. 4, in not sending to a Secretary of State, within three months after abandonment of a seam in the mine, a plan, as prescribed by the Acts.

By s. 38, sub-s. 5, the information may be laid at any time within six months after abandonment, or after service on the owner of a notice to comply with the requirements of the section, whichever last happens.

On January 25, 1900, after the abandonment, the appellant wrote to the respondent: "I beg to point out to you that no plan of the abandoned workings in the seven-feet coal seam has yet been forwarded, as required by s. 38 of the Mines Act. Will you please give the matter your early attention."

On May 25 the appellant again wrote, requiring the respondent to comply with the Act.

The information was laid on July 27, 1900.

The justices dismissed the information.

On a case stated:—

Held, that s. 38, sub-s. 5, was a clause of limitation, that the letter of January 25 was a good notice, and that, six months after service of the notice having expired before proceedings were taken, the information was out of time, and the decision of the justices was right.

CASE stated by justices.

An information was preferred by the appellant, an inspector of mines, charging the respondent, as owner of the Pooley Hall Mine, with failing to comply with the Coal Mines Regulation Act, 1887, s. 38 (1), as amended by the Coal Mines

(1) 50 & 51 Vict. c. 58, s. 38 (as amended by the Act of 1896 (c. 43), s. 4), directs that the owner of an abandoned mine or seam shall within three months after abandonment send a plan to a Secretary of State.

By sub-sect. 4, "If the owner of a mine or seam fails to comply with this section, he shall be guilty of an offence against this Act, and be liable to a fine not exceeding 30*l*."

By sub-sect. 5, "A complaint or information of an offence under this section may be made or laid at any time within six months after abandonment of the mine or seam, or after service on the owner aforesaid of a notice to comply with the requirements of this section, whichever last happens."

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Regulation Act, 1896, s. 4, in that he did not, within three months after the abandonment of a seven-feet coal seam in the mine, send to a Secretary of State an accurate plan of the seam, shewing the boundaries of the workings up to the time of abandonment, and other particulars specified in the Act.

At the hearing it was admitted that no plan had been sent in by the respondent.

On January 25, 1900, after the abandonment, the appellant wrote to the respondent as follows: "Pooley Hall Colliery.—I beg to point out to you that no plan of the abandoned workings in the seven-feet coal seam has yet been forwarded, as required by s. 38 of the Mines Act. Will you please give the matter your early attention."

This letter was received on January 26.

On May 25, 1900, the appellant wrote to the respondent as follows: "Pooley Hall Colliery.—I beg to point out to you that no plan of the workings of the abandoned seven-feet coal seam at this colliery has been sent, as required by s. 38 of the Coal Mines Regulation Act, 1887, and I hereby give you notice, in accordance with s. 38, sub-s. 5, of the Coal Mines Regulation Act, 1887, to comply with the requirements of the above-named section of the Mines Act."

This letter was received on May 26.

The information was laid on July 27, 1900.

The respondent's counsel objected that the letter of January 25, 1900, constituted a notice, under the Coal Mines Regulation Act, 1887, to the owner, to comply with the requirements of that section; that the six months mentioned in the section commenced to run from the date of the service of the notice, namely, January 26, 1900; that the appellant could not, by giving a fresh notice, extend the time for laying the information; and that the information was, therefore, out of time, and the justices had no jurisdiction to hear the case.

The justices upheld the respondent's contention, and dismissed the information.

H. Sutton, for the appellant. The letter of January 25 is not a notice within the meaning of the Coal Mines Regulation

Act, 1887, s. 38, sub-s. 5, and therefore the period of limitation began to run from the date of the receipt of the letter of May 25, and the information was laid in time.

Secondly, even if the letter of January 25 can be read as a notice, there was nothing to prevent the appellant from giving a second and more formal notice, which he did by the letter of May 25. In this case also the time would run from the receipt of that notice, for some meaning must be given to the words in s. 38, sub-s. 5, "whichever last happens."

Thirdly, the respondent was guilty of a continuing offence: Coal Mines Regulation Act, 1887, s. 59.

Simey, for the respondent. As to the appellant's first point, the letter of January 25 is a good notice, within the meaning of s. 38, sub-s. 5. It expressly calls attention to the requirements of the section. It is unnecessary that the notice should contain a threat.

Secondly, if that letter was a good notice, it follows that the period of limitation ran from its service, and could not be postponed by giving a further notice.

[As to the third point, he was stopped.]

H. Sutton replied.

BRUCE J. I am of opinion that the justices have come to a right conclusion as to the construction of s. 38, sub-s. 5, of the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58). That sub-section provides that, "A complaint or information of an offence under this section may be made or laid at any time within six months after abandonment of the mine or seam, or after service on the owner aforesaid of a notice to comply with the requirements of this section, whichever last happens." This is clearly a clause of limitation, and limits the time for laying an information to within six months after either the abandonment of the mine or seam or the service of the notice. The whole sub-section must be read together, and this appears to be the meaning of its provisions. It is true that a difficulty is created by the last words of the sub-section, "whichever last happens." Effect ought to be given to those words if possible; but the words are inconsistent with any

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interpretation which can be placed upon the clause, and they cannot be construed so as to favour the contention of the appellants.

The next question is, Was there a notice given within a period of six months from the information or complaint? This depends on whether the letter of January 25, 1900, was a good notice under the Act. I had some doubt as to this at first, for it is not a notice in express terms requiring compliance with the requirements of the section; but it does refer to the requirements of the section: it calls attention to the plan required by the section, and ends with the words, "Will you please give the matter your early attention." I do not think that in a matter of this kind we ought to be too strict; and, giving the matter my best attention, I have come to the conclusion that I cannot say the justices were wrong in holding that this was a notice, within the meaning of the section, requiring compliance with the provisions of the section. If so, six months had expired before the proceedings were taken, and, therefore, the information was laid too late.

I have only one word to add, and that is as to s. 59, to which our attention has been called by Mr. Sutton. I am quite satisfied that that section does not apply to the present case. The whole section, or the second part of it, at any rate, applies only to a case where a person is guilty of an offence against the Act, for which a penalty is not provided. In this case a penalty is expressly prescribed, and I think we cannot regard this section as applying here.

PHILLIMORE J. I am of the same opinion, for the same reasons.

Judgment for the respondent.

Solicitor for appellant: *The Treasury Solicitor.*
Solicitors for respondent: *Tarry, Sherlock & King.*

P. B. H.

LANGRIDGE, Appellant *v.* HOBBS, Respondent.

1901
Feb. 1.

Vaccination—Neglect to procure—Information—Period at which Offence complete—Limitation of Time—Vaccination Acts, 1867, 1871, 1898 (30 & 31 *Vict. c.* 84, *s.* 29; 34 & 35 *Vict. c.* 98, *s.* 11; 61 & 62 *Vict. c.* 49, *s.* 1).

The appellant was convicted on an information, laid on July 12, 1900, under the Vaccination Act, 1867, s. 29, charging him that, being the parent having the custody of a child born on December 30, 1898, he did unlawfully neglect to cause the child to be vaccinated within six months after birth, not rendering a reasonable excuse for his neglect.

On May 1, 1899, the public vaccinator visited the appellant's house, pursuant to notice, and offered to vaccinate the child, and vaccination was refused.

On July 7, 1899, the vaccination officer served a notice, under the Vaccination Order, 1898, on the appellant, requiring him to have the child vaccinated within fourteen days. No certificate of postponement or successful vaccination was received in respect of the child.

The appellant objected that the information was out of time, having been laid more than twelve months after the offence was committed. The justices disallowed the objection, on the ground that the offence was complete, and the time began to run, on July 21, the date of the expiration of the notice served on the appellant by the vaccination officer.

On a case stated:—

Held, that the offence was complete, and the time began to run, six months after the birth of the child, and the information was out of time.

Case stated by justices.

An information was preferred by the respondent against the appellant, under 30 & 31 Vict. c. 84, s. 29, charging that the appellant, being the parent having the custody of a child born in England on December 30, 1898, unlawfully did neglect to cause the child to be vaccinated according to the provisions of the Vaccination Acts, 1867 to 1898, that is to say, he did not, within six months after the birth of the child, cause it to be vaccinated by some medical practitioner, he not rendering a legal excuse for his neglect, contrary to the form of the statutes, &c.

The following facts were proved or admitted. The appellant was the parent having the custody of the child born on December 30, 1898; appellant's name was duly included in Form H by the vaccination officer, and sent to the public

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vaccinator; the usual notice in Form I was served by the public vaccinator on the appellant, of his intention to attend and vaccinate the child, twenty-four hours previous to his attendance; the public vaccinator visited the appellant's house on May 1, 1899, being within two weeks after receipt of the notice from the vaccination officer, and offered to vaccinate the child, and vaccination was refused. On July 7, 1899, the vaccination officer served notice in Form K on the appellant, requiring him to have the child vaccinated within fourteen days from the date thereof. No certificate of postponement or successful vaccination had been received in respect of the child, and the information against the appellant was laid on July 12, 1900. The Forms H, I, and K, referred to above, are those contained in Sched. 5 to the Vaccination Order of 1898 made by the Local Government Board in pursuance of the powers given to them by the statutes in that behalf. (1)

The appellant by his counsel took the objection that the information was out of time by virtue of s. 11 of the Vaccination Act, 1871, but the justices overruled the objection and convicted the appellant.

The grounds of the justices' determination were as follows.

The child was born on December 30, 1898, and the six months allowed by s. 1, sub-s. 1, of the Vaccination Act, 1898, in which the parent or person having custody of the child has to have the same vaccinated, would expire on June 30, 1899; the Vaccination Order of 1898, made by the Local Government Board under the authority of the statutes in that behalf, provides by paragraph 6, sub-division (*d*), of Sched. 4, as follows: "If the vaccination officer has not received in respect of any child a certificate under s. 2 of the Vaccination Act, 1898, within the time limited by that section, and at the end of seven days after the expiration of six calendar months from the birth of the child has not received any other of the certificates mentioned in sub-division (*a*) of this paragraph, the vaccination officer shall forthwith give a notice . . . . to the parent or other person having the custody of the child. . . . . If that notice is not duly complied with within the time specified therein it will

(1) Statutory Rules and Orders, 1898, p. 1091.

become the duty of the vaccinating officer under the Vaccination Act, 1871, to take proceedings for the enforcement of the law."

The notice in compliance with the Vaccination Order of 1898 was served on the appellant on July 7, 1899, and required the appellant to have the child vaccinated within fourteen days from the date thereof, so that the notice expired on July 21, 1899, and as therefore the vaccination officer could not commence proceedings until after that date, the justices were of opinion that, in computing the time in which proceedings could be instituted, the same should be reckoned from the date of the expiration of the time mentioned in the notice, until which time the offence was not complete, and not from the date of attainment by the child of the age of six months, as the matter of information did not arise until the expiration of the fourteen days, when the notice was disregarded; and therefore the time for taking proceedings would not expire until July 21, 1900; the information in this case was laid on July 12, 1900.

If the Court should be of opinion that the conviction was legally and properly made then the conviction was to stand, but if the Court should be of opinion to the contrary then the conviction was to be reversed.

Schultess Young, for the appellant. The conviction was wrong, for the information was out of time. By the Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 11, "Any complaint may be made, and any information laid, for an offence under the Vaccination Acts, 1867 and 1871, at any time not exceeding twelve months from the time when the matter of such complaint or information arose, and not subsequently." By s. 34 of the Act of 1867, "it shall not be necessary . . . . to prove that the defendant had received notice from the registrar or any other officer of the requirements of the law in this respect." These provisions shew that the offence was complete, and the period of limitation began to run six months after the birth of the child, independently of any notice.

[He was stopped.]

The respondent did not appear.

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WILLS J. The legislation on this subject is somewhat complicated. By the Vaccination Act, 1867 (30 & 31 Vict. c. 84), s. 16, "The parent of every child born in England shall . . . . cause it to be vaccinated by some medical practitioner." This section imposes a positive duty to cause the child to be vaccinated. Then by the Vaccination Act, 1898 (61 & 62 Vict. c. 49), s. 1, sub-s. 1, "The period within which the parent . . . . shall cause the child to be vaccinated shall be six months from the birth of the child." Therefore if the vaccination has not been performed at the end of six months from the birth of the child an offence has been committed, so that in the present case, the child having been born on December 30, 1898, the offence was complete after June 30, 1899, and as the proceedings were not taken until several days after June 30, 1900, they were out of time. When the Vaccination Orders are studied it is clear that they do not create any fresh offence, and the Local Government Board has no power to create new offences. The orders are rules for the guidance of the officers who have to perform duties in connection with vaccination, as is shewn by the recital. By Sched. 4, par. 6, sub-division (*d*), "If the vaccination officer has not received in respect of any child a certificate under s. 2 of the Vaccination Act, 1898, within the time limited by that section, and at the end of seven days after the expiration of six calendar months from the birth of the child has not received any other of the certificates mentioned in sub-division (*a*) of this paragraph, the vaccination officer shall forthwith give a notice . . . . to the parent. . . . . If that notice is not duly complied with within the time specified therein it will become the duty of the vaccination officer under the Vaccination Act, 1871, to take proceedings for the enforcement of the law." If the child is not vaccinated within the proper time, and no sufficient excuse is produced, the vaccination officer is to give notice, and if that notice is not complied with he must take proceedings for the enforcement of the law. A locus pœnitentiæ is allowed to the parent, in order to prevent the necessity for taking proceedings. That is all; no fresh offence is created, so the offence remains complete on the expiration of six months from the birth of the child; but the information was not laid

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until July 12, 1900, more than a year after that date, and was therefore too late. It follows that the decision of the justices was wrong, and the conviction must be quashed.

PHILLIMORE J. I am of the same opinion for the same reasons.

Conviction quashed.

Solicitor for appellant: *B. Alabone Cheverton.*

P. B. H.

VESTRY OF FULHAM, APPELLANTS *v.* MINTER, RESPONDENT.

1901

Jan. 15, 16.

Metropolis — Management Acts—Streets— Paving Expenses—Open Spaces— "Owner"—Land capable of being made a Source of Profit—18 & 19 *Vict. c.* 120, *s.* 250—25 & 26 *Vict. c.* 102, *s.* 77—40 & 41 *Vict. c.* 35, *s.* 1—44 & 45 *Vict. c.* 34, *s.* 5—56 & 57 *Vict. c. lxxi.*

Land was conveyed to a vestry in fee simple "to the end and intent that the same premises should be at all times thereafter kept and maintained as an open space for the perpetual use thereof by the public for exercise and recreation." The land was an open space abutting on a new street, and was acquired under the powers conferred on the vestry by the Open Spaces Acts, 1877 and 1881, by which the land was held in trust for the perpetual use thereof by the public for exercise and recreation, and for no other purpose.

By the London Open Spaces Act, 1893, the vestry might erect on the land convenient and ornamental buildings, and such appliances as they might think fit for purposes of exercise and recreation, and for other like purposes. They erected a band stand, a cloak-room, and a refreshment stall. The refreshment stall was let at a rent to a caterer. The band stand was not let, but seats for the public were let by the vestry to a contractor at a rental.

The vestry assessed the respondent, as owner of houses on the opposite side of the street, upon the basis that the cost of paving the new street should be defrayed by the owners of the houses and lands on the opposite side of the street, and not in any part by the owners of the land which included the open space.

A summons to recover the amount apportioned on the respondent was dismissed on the ground that the apportionment was invalid, because a part of the cost of paving ought to have been apportioned on the vestry as owners of the open space.

On a case stated:—

Held, that the open space was not land which was incapable of

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becoming a source of profit, and therefore the vestry were the persons who would receive the rent of the land if the same were let at a rack rent, and were owners of the open space within the definition in the Metropolis Management Act, 1855, s. 250, and were liable as owners to contribute to the cost of paving the new street, and the summons was rightly dismissed.

CASE stated by John Rose, Esq., a metropolitan police magistrate.

The respondent was summoned on a complaint by the clerk to the appellants for that he, the respondent, had refused or neglected to pay to the vestry or to their clerk the sum of 228*l.*, although the same had been duly demanded, such sum being charged upon him as owner of certain houses or lands forming or bounding or abutting upon a certain new street or way known as Bishop's Park Road, Section One, in respect of paving works to be carried out in the said new street under and by virtue of the provisions of the Metropolis Management Act, 1855, and the other Acts of Parliament amending the same.

Upon the hearing the following facts were proved or admitted:—

Bishop's Park Road, Section One, was a new street within the parish of Fulham. On the north-west side it was bounded by a row of houses, and on the south-east by an open space called Bishop's Park.

By an indenture dated March 15, 1894, and made between the Bishop of London of the first part, the Ecclesiastical Commissioners for England of the second part, and the vestry of the parish of Fulham of the third part, the land therein described was conveyed to the appellants in fee simple to the end and intent that the same premises should be at all times thereafter kept and maintained as an open space for the perpetual use thereof by the public for exercise and recreation. Part of the land thereby conveyed abutted on the south-eastern side of the new street. This land was acquired by the appellants under the powers conferred upon them by the Open Spaces Acts.

By 40 & 41 Vict. c. 35, s. 1, the open space is held "in trust for the perpetual use thereof by the public for exercise and

recreation," and by 44 & 45 Vict. c. 34, s. 5, "for no other purpose." By 56 & 57 Vict. c. lxxi., the vestry may erect thereon (inter alia) convenient and ornamental buildings and such appliances as they may think requisite for purposes of exercise and recreation and for other like purposes.

Upon the open space of land had been erected a band stand, a cloak-room, and a refreshment stall. The appellants let the refreshment stall at a rent of 25*l.* per annum to a caterer. The band stand was not let, but seats for the public were let by the vestry to a contractor at a rental.

On January 17, 1900, the appellants resolved as follows: "That whereas Bishop's Park Road, Section One, in the parish of Fulham, being a new street, is not paved to the satisfaction of this vestry, and it is deemed by them to be necessary and expedient that the same should be so paved. It is hereby resolved and ordered that the said street be taken to and paved under the provisions of 18 & 19 Vict. c. 120, and 25 & 26 Vict. c. 102; that the surveyor's plan and estimate be approved and adopted, that the estimated cost of the said paving works be apportioned upon the owners of the houses or land abutting upon or bounding the said street at the proportions and in the amount as set forth in the apportionment hereby made.

The respondent was the owner of certain houses in the new street, namely, Nos. 1, 3, and 6, Bishop's Park Road, Section One, and by the apportionment the sum of 228*l.* was charged upon him as such. The said sum had been demanded of him and was not paid.

The apportionment proceeded upon the basis that the cost of paving the new street should be defrayed by the owners of the houses and lands on the north-west side thereof, and not in any part by the owners of the land on the south-east side.

It was contended upon the part of the respondent that the apportionment was invalid, for that a part of the cost of paving ought to have been apportioned upon the appellants as owners of the open space abutting upon the south-east side of the new street.

It was contended upon the part of the appellants that the

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apportionment was valid, for the open space was extra commercium or subject in perpetuity to the burden of a public right which deprived the appellants of the beneficial use of it.

The magistrate was of opinion that the contention of the respondent was correct, for the reasons stated in his judgment, and dismissed the summons.

The question for the opinion of the Court was whether the determination of the magistrate was right in law.

The judgment of the magistrate was as follows :—

The question is whether the apportionment of the estimated expenses of paving a new street under the Metropolis Management Acts is valid, inasmuch as it does not include the vestry as the owners of the land bounding or abutting on the new street and held under the Open Spaces Acts. The Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 105, enacts that the expenses of paving a new street must be paid by the owners of the houses forming such street, and under the Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 77, the owners of the land bounding or abutting on such street shall be liable to contribute. By the interpretation clause, s. 250, of the principal Act, "owner" shall mean the "person for the time being receiving the rack rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent." Why was this definition, which limits the ordinary meaning of the word "owner," given in the Act? The reason may be this. A new street has to be paved. The first cost of the paving is laid on the frontagers, who derive the immediate benefit from the paving. The Legislature did not think fit to impose the first cost, which is considerable, on mere occupiers, whose tenancies might be short and means small, or even on mere owners, who might have a reversionary interest in the land and get little or no present return from it or advantage from the paving, but the Legislature might well have thought that where the owner did or, if he chose, might get substantial profit, rack rent, from the land—perhaps indirectly from the improvement of the street—he ought to bear

his part of the expense of paving it, and therefore have given this definition of "owner."

The vestry are in law owners of land bounding or abutting on the street. They also would receive the rack rent of the land if the land were let at a rack rent, and they are therefore within the literal terms of the interpretation clause. But it is said that they are, nevertheless, not owners within the meaning of the Act, because the land cannot be let at a rack rent. Perhaps if the attention of the Legislature had been called to the fact that there was land from which no profit could possibly be got, out of which the cost of paving could be paid, the owners of that land would have been expressly exempted from contribution. It may not be unreasonable to imply such exemption. That some limitation of the literal terms of s. 77 and the definition clause, s. 250, may be implied is evident from *Angell* v. *Paddington Vestry* (1), in which a church and its land were held to be neither house nor land within the Act, and perhaps also from *Plumstead Board of Works* v. *British Land Co.* (2), in which the Exchequer Chamber held that the owners of the soil of highways at the end of a street were not owners of land in the street, so as to be liable to the cost of paving it. The learned counsel for the vestry in a fair and skilful commentary on the cases mainly relied on the principle stated in *Great Eastern Railway* v. *Hackney Board of Works* (3) by Lord Watson, who said: "The authorities cited in the course of the argument appear to me to establish this proposition; that the person vested with the property of heritable subjects, which have been placed extra commercium, or are subject in perpetuity to the burden of a public right which deprives him of their beneficial use, is not an owner of land within the meaning of the 77th section of the Act of 1862." The principle is there expressed in the terms of the Roman and Scottish rather than in those of English law. But Mr. Macaskie also referred me to the language used by Bowen L.J., who said in *Wright* v. *Ingle* (4): "Whether in the case of premises which were prevented by an Act of Parliament from

(1) (1868) L. R. 3 Q. B. 714.
(2) (1875) L. R. 10 Q. B. 203.
(3) (1883) 8 App. Cas. 687, at p. 693.
(4) (1885) 16 Q. B. D. 379, at p. 402.

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being let at a rack rent there ever could be an owner within the meaning of s. 250, I very much doubt. I am inclined to think that if the incapacity to be let were stamped on the premises they never could have an owner within the meaning of s. 250." Let me try to apply to the case before me these authoritative dicta, which afford the chief support to the argument for the vestry. This land was acquired and is held in fee simple by the vestry under statutory powers "in trust for the perpetual use thereof by the public for exercise and recreation," under 40 & 41 Vict. c. 35, s. 1, and for no other purpose, by 44 & 45 Vict. c. 34, s. 5. But the vestry may erect and maintain thereon (inter alia) convenient and ornamental buildings and such appliances as they may think requisite for purposes of exercise and recreation, and for refreshment rooms, band stands, conveniences, or for other like purposes: 56 & 57 Vict. c. lxxi. Is the effect of these statutory restrictions to place the land extra commercium within the meaning of Lord Watson, or is the incapacity to let stamped on the premises within the meaning of Bowen L.J.? The open space is by the statutes placed extra commercium, in the sense that it cannot be alienated or disposed of in any way inconsistent with the perpetual use of it by the public for exercise and recreation. There is, however, no express statutory prohibition against letting the land or buildings lawfully erected thereon on terms which will preserve the rights of the public, and I do not think that such prohibition must necessarily be implied from the Open Spaces Acts; but perhaps it is unnecessary to establish the proposition that the land may be actually let at a rack rent in order to bring the owner within the definition in s. 77, and I think that the decisions, by which I am bound, leave me free to adopt the view taken by Collins J. in *Vestry of St. Giles, Camberwell* v. *London Cemetery Co.* (1), who says: "In order to be exempt, the land must be extra commercium; but where the owners are entitled by statute to use it beneficially, receiving as profit a lump sum which is equivalent to a rack rent, the land is not extra commercium." In this case the owners are expressly empowered by the London

(1) [1894] 1 Q. B. 699, at p. 706.

Open Spaces Act, 1893, s. 25, to erect and maintain buildings and appliances for exercise and recreation and for refreshment rooms, band stands, and conveniences, and for other like purposes. It would be easy to suggest buildings and appliances which might be erected for exercise and recreation from which profit might be derived. It could not be reasonably implied that the refreshments, for example, involved in the use of refreshment rooms are to be supplied gratis or at cost price to the public, and if charges may lawfully be made for these accessories, they become sources of profit which may be equivalent to a rack rent. If rack rent or its equivalent may lawfully be got, an inquiry whether it is actually got may be superfluous; but some profit is in fact got from the open space. A refreshment stall is let for 25*l.* a year. Chairs are supplied for the use of which money is paid. Fees are taken with the sanction of the vestry for the use of a cloak-room. The receipts may not perhaps at present amount to a rack rent, but it is conceivable that a larger sum might be obtained from these sources, especially for the privilege of selling refreshments at a place of popular resort for exercise and recreation. Mr. Macaskie said that the refreshment stall is not on the land abutting on the section of the "new street," which is the subject of the apportionment. I think that the rent for it may be regarded as derived not merely from the refreshment stall, but from the whole area of the open space, including the part abutting on the street which makes the stall valuable. If, however, I am wrong in so thinking, the fact remains that other refreshment rooms or means of deriving profit may be lawfully set up on the piece of land actually bounding or abutting on the new street. In my opinion the vestry are, within 25 & 26 Vict. c. 102, s. 77, and 18 & 19 Vict. c. 120, s. 250, owners of land bounding or abutting on the street; they are trustees for the public, and "would receive the rack rent of the land if the land were let at a rack rent," as I think it lawfully might be without interfering with the purposes to which the land is devoted by statute.

No decided case is on all fours with the present one, and Mr. Macaskie pointed out to me the distinctions between it

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and those cases which seemed to be against him. But several decisions were cited that were nearly in point, and tend to support the conclusion to which I have come, namely, that the apportionment is invalid because the owners of the open space are not included as contributories to the expense of paving the new street.

The vestry appealed.

Macaskie, for the appellants. The magistrate was wrong in holding that the apportionment was invalid. The vestry were only liable to contribute to the cost of paving the street if they were the owners within the meaning of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 250, by which the word owner means "the person for the time being receiving the rack rent of the lands or premises in connection with which the said word is used, or who would so receive the same if such lands or premises were let at a rack rent." The authorities establish that a person cannot be made liable as owner in respect of property held under conditions which render it incapable of being a source of profit, and by the terms of the deed of March 15, 1894, and by the provisions of the Open Spaces Acts referred to in the case, the land here in question cannot be so used as to become a source of profit to the vestry. That being so, the apportionment made by the vestry was good, and the respondent is liable to pay the sum demanded. [He referred to *Angell* v. *Paddington Vestry* (1); *Bowditch* v. *Wakefield Local Board* (2); *Pound* v. *Plumstead Board of Works* (3); *Plumstead Board of Works* v. *British Land Co.* (4); *Caiger* v. *St. Mary, Islington, Vestry* (5); *Great Eastern Railway* v. *Hackney Board of Works* (6); *Wright* v. *Ingle* (7); *Plumstead Board of Works* v. *Ecclesiastical Commissioners* (8); *Vestry of St. Giles, Camberwell* v. *London Cemetery Co.* (9); *In re Christ Church Inclosure Act, Meyrick* v. *Attorney-*

(1) L. R. 3 Q. B. 714.
(2) (1871) L. R. 6 Q. B. 567.
(3) (1871) L. R. 7 Q. B. 183.
(4) L. R. 10 Q. B. 203.
(5) (1881) 50 L. J. (M.C.) 59.
(6) 8 App. Cas. 687.
(7) 16 Q. B. D. 379.
(8) [1891] 2 Q. B. 361.
(9) [1894] 1 Q. B. 699.

General (1); *Vestry of St. Mary, Islington* v. *Cobbett* (2); *Hornsey District Council* v. *Smith* (3); *Lambeth Overseers* v. *London County Council.* (4)]

Bray, Q.C. (*B. A. Cohen* with him), for the respondent. It is not necessary that the person whom it is sought to charge as owner should be actually making a profit out of the hereditaments in question, in order to render him liable; it is sufficient if the hereditaments are capable of being made the subject of profitable occupation. It is clear that there are many possible states of circumstances under which the hereditaments here in question might be made a source of profit to the vestry consistently with the terms of the deed and the statutes referred to in the case. Moreover, it appears from the case that in respect of some portion of the hereditaments the vestry are now in fact receiving a profit. The decisions bearing on the question are not all entirely consistent, but the balance of authority is in favour of the respondent's contention.

Macaskie, in reply, referred to *Williams* v. *Wandsworth Board of Works.* (5)

BRUCE J. I think the decision of the learned magistrate was right, and that he has correctly and accurately stated the law, and correctly applied it to the facts of this case.

I do not propose to go through the numerous cases which have been cited during the argument, but I think the principle of the cases may be said to be this—that where land or houses exist abutting upon a new street, then the person who receives the rent, or who, if rent were payable, would receive the rent, and who is the owner within the meaning of the definition of owner given in the Act of Parliament, is liable to contribute to the expenses of the new street. This exception has been established—that where the premises held are of such a character that they are struck with a legal incapacity of ever being used, if a house, as a house, or, if land, it is struck with the same incapacity of ever being let at a rack rent, that incapacity being

(1) [1894] 3 Ch. 209.
(2) [1895] 1 Q. B. 369.
(3) [1897] 1 Ch. 843.
(4) [1897] A. C. 625.
(5) (1884) 13 Q. B. D. 211.

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of a permanent character, and of such a kind as to affect the nature of the property, then the property is not property of which there can be an owner within the meaning of the statute. That is, I think, the substance of the definition given by the judges in *Wright* v. *Ingle*. (1) I may further refer to the definition given by Lord Watson in *Great Eastern Railway* v. *Hackney Board of Works* (2), where he held that the company were not owners of land abutting on houses, because "the person vested with the property of heritable subjects, which have been placed extra commercium, or are subject in perpetuity to the burden of a public right, which deprives him of their beneficial use, is not an owner of land within the meaning of s. 77 of the Act of 1862." So that, unless the land or the houses are brought within one of these definitions, unless they are struck with an incapacity to be used beneficially, they are liable to contribute to the expenses of the new street.

Now in the present case the question we have to consider is this: whether the land in question is struck with such an incapacity. I think not. It is conveyed to be kept and maintained as an open space for the perpetual use thereof by the public for exercise and recreation, and for no other purpose. But, although it is subject to that burden, it seems to me that that is not a burden which deprives the vestry altogether of the beneficial use of the property. They possess power to erect and maintain on the open space buildings for the accommodation of keepers, constables, and other persons employed by them in connection with the maintenance of the open space, also such convenient and ornamental buildings and such appliances as they may think requisite for the purpose of exercise and recreation, and for refreshment rooms, band stands, conveniences, and other like purposes, provided that the consent of the county council be first obtained. So that they have the power here to do many things which are not inconsistent with the enjoyment of the place as an open space for the public. They may build a gardener's cottage, and the gardener who is attending to the open space may live there. It may be said they are not

(1) 16 Q. B. D. 379. (2) 8 App. Cas. 687, at p. 693.

entitled to charge a rent for his living there. I do not know whether that is so or not. The occupation of the cottage would be a beneficial occupation, because it would be taken into account in payment of his wages, and therefore it would be a beneficial occupation by them for the purpose of the occupation of their servant. Again, it may be possible, although no charge could be made to the public for listening to the band or for entering the ground, that the bandmaster might solicit and obtain contributions from the public, and for the privilege of playing there and soliciting contributions from the public he might pay a sum of money to the vestry, and there might then arise beneficial occupation. So with regard to the refreshment room. That is let, and the vestry do derive a sum of 25*l.* a year for the use of the refreshment room. There again there is a beneficial occupation, and so in many ways the vestry might derive, consistently with the terms on which they hold this land, a beneficial occupation, and it cannot be said that this land is extra commercium, or that although it is dedicated to the use of the public the vestry are prohibited from obtaining any profit from it.

Then it was said that they could not let it at a rack rent. Letting at a rack rent, I think, merely means that the land is let for the best return that can be obtained for it. But I shall adopt the dictum of Collins J. in *Vestry of St. Giles, Camberwell* v. *London Cemetery Co.* (1) In considering this question of a rack rent he says: "But where the owners are entitled by statute to use it beneficially, receiving as profit a lump sum which is equivalent to a rack rent, the land is not extra commercium. It would be too narrow a conclusion that, because the reditus is not received in the shape of a rack rent, the land is placed extra commercium, and the owners are not owners within the meaning of the statute." Therefore I think here there is a beneficial occupation, and, there being a beneficial occupation, I think the vestry are the owners of the land within the meaning of the definition given of owners, and that they are liable to contribute to the expense of the new street.

(1) [1894] 1 Q. B. 699, at p. 706.

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PHILLIMORE J. I am of the same opinion. I wish to express my obligation to the learned magistrate for the way in which he has stated this case and assisted us with his reasons. By the joint effect of the two Metropolis Management Acts, the owners of houses and land bounding or abutting upon a new street are bound to pay to the vestry expenses of paving, and the other expenses of making up the new street, and the owner means the person for the time being receiving the rack rent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would receive the same if the lands or premises were let at a rack rent. The very large and general words of that section have been limited by decisions to this extent, and to this extent only—that if the lands or premises are for all time incapable of being beneficially used, they are not to be treated as lands which are or could be let at a rack rent. At one time I thought perhaps the right thing was to say, "If the lands could never legally be let at a rack rent"; but the decision in *Vestry of St. Giles, Camberwell* v. *London Cemetery Co.* (1), and I think the language of Lord Watson in *Great Eastern Railway* v. *Hackney Board of Works* (2), point to the fact that that is somewhat too narrow a view. The lands must be, as Bowen L.J. points out with regard to the buildings in *Wright* v. *Ingle* (3) (and the same would be true of land), physically capable of beneficial enjoyment—profitable enjoyment. They must be also legally capable of profitable enjoyment; apparently not necessarily legally capable at the moment, but legally capable at some time or other. If those two conditions are satisfied, then the lands fall into the ordinary category, and are lands abutting on the street, which have an owner, and if there is an owner in this case there is no question that the owner must be the vestry.

Now what one has to consider is, is this land capable of any profitable or beneficial enjoyment? I agree it is not capable of much; but the fact remains, first of all, that

(1) [1894] 1 Q. B. 699. (2) 8 App. Cas. 687, at p. 693.
(3) 16 Q. B. D. 379, at p. 399.

actually at this moment a portion of the land is beneficially enjoyed, and, secondly, that beneficial and profitable enjoyment can to some extent be got, possibly out of every particle of this land. I quite agree that primarily the use for which this land is destined is for the recreation and enjoyment of the public. Nothing must interfere with that; but, consistently with that, sometimes really assisting that, there may be uses out of which profit can be derived.

Mr. Macaskie has tried to point out to us that the vestry must be restricted by the express provisions of 44 & 45 Vict. c. 34, s. 5, the Open Spaces Act, 1881. It is not necessary to consider whether, if the section did apply, it would have all the restrictive force which he contends for, because this land is, in my opinion, and in the opinion of my learned brother, as I understand, not to be deemed to be acquired under that Act, but under the more beneficial Acts of 1877 and 1887, for, if a public body is enabled to exercise public powers under either of two statutes, it is to be deemed, if there is any difference in respect of the two, to take it under the statute under which it takes most beneficially: *The Ettrick.* (1) Therefore I am of opinion that this vestry must be taken to have acquired this land under the Acts of 1877 and 1887. It is very possible that the Act of 1881, and the powers acquired under it, remain for the purpose of acquiring churchyards, cemeteries, and burial grounds, and it is very possible that under no other Act can the vestry take those open spaces. It may very well be that sentiment, apart from other reasons, may make it desirable that the vestry should make no money out of those particular open spaces, and therefore, with regard to those particular open spaces, they may be specially restricted. We have not to consider that here, because they take under the general powers, and, taking under the general powers, they have the general powers which all owners have except so far as they are restricted. They are restricted by the trust, and that is really the only restriction we have to look at. No doubt they are also restricted by the fact that the vestry, being a public body, can only spend its money upon certain definite public objects, and would be proceeding

(1) (1881) 6 P. D. 127.

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ultra vires if it embarked in trade or similar enterprises. But I do not think we ought to look at that. The question we have to look at is, whether the land can be beneficially used, and not whether the particular owner at the moment can beneficially use it. It may be that the vestry could beneficially use it in many ways besides those which my learned brother has pointed out. Certainly they do use it in some ways at present. Any hardship which might follow from this land being deemed to be liable to contribute to the assessment of the street can be got over, for the vestry themselves, acting fairly and reasonably, can make a minor assessment upon the land separate from that which they make upon the houses. It is clear that this land of the park is by no means so profitable as the opposite land of the houses, but it does bring in, within the view of the Act, some profit to its owners, who are the vestry, and therefore to some extent it ought to contribute, in my judgment, to the paving of this street. Therefore the assessment upon the respondent, which did not take into consideration any contribution by the vestry as the owners of the park, was a bad assessment, and the learned magistrate was right in dismissing the summons, and this appeal must be dismissed with costs.

Judgment affirmed. Leave to appeal granted.

Solicitor for appellants, the vestry: *T. Blanco White.*
Solicitors for respondent: *Cooper & Bake.*

P. B. H.

[IN THE COURT OF APPEAL.]

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MAYOR, ALDERMEN, AND BURGESSES OF WOLVERHAMPTON *v.* EMMONS.

Specific Performance—Building Contract—Land Conveyed in Consideration of Contract to Build—Defined Works—Damages not adequate Compensation—Exception from General Rule as to Building Contracts.

The plaintiffs, an urban sanitary authority, in pursuance of a scheme of street improvement, sold and conveyed to the defendant a plot of land abutting on a street, the defendant covenanting with them that he would erect buildings thereon within a certain time. The nature of the buildings to be erected was not precisely specified by the covenant, but subsequently, in consideration of the plaintiffs' giving the defendant further time for performance of his obligation to erect buildings, he agreed to erect on the land eight houses in accordance with certain plans, submitted by him to, and approved by the plaintiffs, which definitely shewed the nature and particulars of the houses to be erected. The defendant failing to perform this last-mentioned agreement, the plaintiffs brought an action against him claiming specific performance:—

Held, that the case came within the class of cases which has been recognised by the Courts as forming an exception to the general rule that specific performance of a building contract will not be ordered, and that an order ought to be made against the defendant for specific performance of his contract to build houses in accordance with the before-mentioned plans.

APPLICATION by the defendant for judgment or a new trial in an action tried before Wills J. and a jury.

The action was for specific performance of a contract by the defendant to erect buildings, or, in the alternative, for damages for breach of the contract.

The plaintiffs had obtained a provisional order, which was subsequently confirmed by Act of Parliament, authorizing them, as the sanitary authority for the borough of Wolverhampton, to carry out an improvement scheme dealing with an insanitary area by the construction of new streets and the erection of better houses and buildings therein. For the purposes of this scheme they acquired (among others) the properties in a street in the borough called Canal Street, and

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proceeded to put them up for sale in lots. The defendant having become the purchaser of certain lots, by indenture dated July 31, 1897, the plaintiffs, in consideration of the sum of 1000*l.*, conveyed to the defendant in fee the plot of land fronting upon Canal Street, delineated in a plan drawn on the deed, and containing 1127 square yards or thereabouts, and the defendant thereby covenanted with the plaintiffs that he would pull down the existing buildings thereon, that he would not erect any building on the land until an elevation of the proposed building had been submitted by him to, and approved by the plaintiffs' public works committee, and that he would commence to erect upon the land within twelve calendar months from May 25, 1897, a new building, or new buildings, fronting to Canal Street, of a minimum height of thirty-five feet from the pavement to the eaves or parapet, and not more than the height regulated by the by-laws for the time being in force in the borough of Wolverhampton, up to the line of street shewn in the said plan, and would complete the same ready for occupation within two years from the date aforesaid. The defendant pulled down the existing buildings on the plot conveyed, but did not commence to erect buildings in pursuance of his covenant. After the lapse of rather more than a year, the town clerk on behalf of the plaintiffs wrote to the defendant, reminding him that he had not complied with the covenant; and a correspondence thereupon ensued between the town clerk on one side and the defendant and his solicitors on the other, in the course of which the town clerk threatened that legal proceedings would be taken on the covenant, and the defendant promised on several occasions to submit plans for buildings. The effect of the correspondence was held by Wills J., and subsequently by the Court of Appeal, to be that, in consideration of the plaintiffs' giving further time to the defendant for the fulfilment of his obligation to erect buildings, the defendant agreed without delay to commence and proceed with the erection on the land of eight houses, in accordance with plans which were ultimately submitted by him to, and approved by the plaintiffs' public works committee. The Court of Appeal, as will be

seen, were of opinion that these plans contained sufficiently definite details as to the elevation, form, materials and other particulars of the proposed houses for the purposes of an order for specific performance. The defendant failing to carry out this last-mentioned agreement, the plaintiffs brought their action against him as above mentioned. The learned judge at the trial directed the jury to assess the damages provisionally, in case he should ultimately be of opinion that the contract was not one of which specific performance should be ordered. The jury assessed the damages at 50*l*. The learned judge subsequently gave judgment for the plaintiffs, ordering specific performance. (1)

Jelf, *K.C.*, and *Disturnal*, for the defendant. The general rule is that the Court will not order specific performance of a building contract, on the ground of the inability of the Court to superintend the performance of the works: see per Kay L.J., *Ryan* v. *Mutual Tontine Westminster Chambers Association*. (2) An exception has been recognised to this general rule in cases where, a railway company having acquired land from a landowner on the terms that they would do accommodation or other works for the benefit of his remaining land, the company afterwards refused to do those works. But those cases are very exceptional, and depend on the consideration that under the peculiar circumstances damages were not an adequate remedy to the owner of the land adjacent to the railway. The case of *Wilson* v. *Northampton and Banbury Junction Ry. Co.* (3) shews that this exception will not be extended to all cases where lands are taken by a railway company on the terms that they will execute works; and it is submitted that there is

(1) Points were raised in the case, and argued at considerable length, which do not form the subject of this report, namely, as to whether the judge was right in allowing an amendment of the statement of claim, and whether the plaintiffs by the way in which they had conducted their case at the trial had precluded themselves from insisting on specific performance. These points, which really turned on matters of fact and discretion, were not considered reportable, and therefore the facts and the portions of the arguments and judgments which specially related to them are not given.

(2) [1893] 1 Ch. 116, at p. 128.

(3) (1874) L. R. 9 Ch. 279.

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nothing in the present case to take it out of the general rule. The case of *Wilson* v. *Northampton and Banbury Junction Ry. Co.* (1) is a strong authority in the defendant's favour. Lord Selborne L.C. in giving judgment said: "An agreement, which is not so specific in its terms or in its nature as to make it certain that better justice will be done by attempting specifically to perform it than by leaving the parties to their remedy in damages, is not one which the Court will specifically perform." It is submitted that those observations apply to the present case. Here the covenant to erect buildings contained in the conveyance of July 31, 1897, is clearly one of which specific performance could not be ordered, as the nature of the buildings is not specified. The learned judge was wrong in holding that the subsequent correspondence amounted to a binding agreement by the defendant to erect the houses shewn on the plans. It amounted to no more than a discussion as to the performance of the original covenant by the defendant, and the submission of plans under it; and the defendant would have been at liberty at any time to withdraw the plans which he had submitted, and erect other buildings instead of the houses shewn on those plans. How is an order for specific performance to be worked out in such a case? Is there to be an application to commit the defendant for contempt, whenever the plaintiffs think that the materials used are not sufficiently good, or that there is any other defect in the construction of the houses, and is the Court then to hold an inquiry as to such matters? It is submitted that to grant specific performance in such a case would involve just the difficulties to avoid which the general rule was established. In *Price* v. *Corporation of Penzance* (2), upon which the plaintiffs will rely, the case appears to have been really settled by voluntary agreement on the part of the defendants to do the works. An order for specific performance is a matter of discretion, and the Court will consider, before making one, the relative loss which will be occasioned to the parties respectively by performance or non-performance of the contract: see *Pembroke* v. *Thorpe*. (3) The

(1) L. R. 9 Ch. 279.
(2) (1844) 4 Hare, 506.
(3) (1740) 3 Swans. 437, at p. 443; 19 R. R. 254.

smallness of the damages given by the jury shews that they did not think that these houses would have been of much value to the plaintiffs by way of increasing the rates, if they had been built. The expense of building them would amount to some thousands of pounds, and the Court ought not, it is submitted, to compel the defendant to expend that amount, when the sum given by the jury shews that the houses would be of so little value when built.

[They also cited *Oxford* v. *Provand* (1); *Wilson* v. *Furness Ry. Co.* (2); *Webb* v. *Direct London and Portsmouth Ry. Co.* (3); *South Wales Ry. Co.* v. *Wythes.* (4)]

A. T. Lawrence, K.C., and *R. J. Lawrence*, for the plaintiffs. This case comes within the exception to the general rule that specific performance will not be ordered in respect of a building contract. The learned judge was right in holding that the correspondence subsequent to the deed of July 31, 1897, amounted to an agreement by the defendant to build houses as shewn on the plans. Those plans sufficiently set forth the particulars of the work to be done. There is, therefore, a defined work, of which the Court may order specific performance. The defendant acquired the land on the terms that he would erect buildings upon it, and, that being so, the cases shew that the Court will order specific performance, if the work be of a defined nature, and if damages would not be an adequate remedy for the breach of contract: see Fry on Specific Performance, 3rd ed. pp. 44–45, ss. 93–103. Damages in this case would afford the plaintiffs no adequate remedy. The plaintiffs are not in the position of a private individual who has entered into a contract for the sake of pecuniary profit, and can be compensated for breach of it by damages. They are a corporation existing for certain public purposes, and representing for those purposes the inhabitants of the borough. The mode of carrying out a scheme for the improvement of the town, such as they were authorized to carry out here, is to acquire property, and dispose of it to private speculators, taking covenants from them respectively to build on the land

(1) (1868) L. R. 2 P. C. 135.
(2) (1869) L. R. 9 Eq. 28.
(3) (1852) 1 D. M. & G. 528.
(4) (1854) 1 K. & J. 186.

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purchased. The object of taking those covenants is the improvement of the town by carrying out the scheme as a whole. If persons, who have entered into such covenants, do not build in pursuance of those covenants, the scheme is marred. The plaintiffs do not want pecuniary compensation. They want the houses built. A vacant space like this in the middle of buildings in a street is made a receptacle for refuse, and becomes an eyesore and nuisance to the town and the adjacent proprietors who have performed their covenants to build. The damage caused by the breach of the defendant's contract to the plaintiffs, as representing the borough, is not capable of being estimated in terms of, or compensated for by, pecuniary damages. The difficulty of estimating the damage pecuniarily was no doubt felt by the jury, who were directed by the judge to assess the damages provisionally, the main question being one of specific performance. They probably thought that damages were quite a subsidiary matter, which accounts for their not giving more than they did. *Price* v. *Corporation of Penzance* (1) and *Cubitt* v. *Smith* (2) are authorities strongly in the plaintiffs' favour. The fact that the contract to build these houses may turn out an unremunerative one for the defendant is no argument against granting the plaintiffs specific performance of it. Assuming for the moment that the learned judge was wrong in holding that the correspondence amounted to a contract by the defendant to build the houses, it is submitted that it is not essential that there should be an actual contract to that effect. The authorities shew that, where a defendant, having acquired land on the terms that he will erect buildings, afterwards refuses to do so, the Court will go all possible lengths to compel him to perform his contract; and, where in such cases a difficulty arises from the works not being sufficiently specified in the contract originally, in order to relieve the Court from this difficulty, it is not necessary there should actually be a contract subsequently for specific works, but it is sufficient, if, by what takes place subsequently between the parties, the work is sufficiently ascertained to enable the Court to see what works they ought

(1) 4 Hare, 506.

(2) (1864) 11 L. T. 298.

to order to be performed. *Price* v. *Corporation of Penzance* (1) seems to shew that it is not essential that there should be an actual agreement subsequently in order to define the work for the purposes of specific performance.

Jelf, *K.C.*, for the defendant, in reply.

A. L. SMITH M.R. This is an application by way of appeal from the judgment of Wills J., who made an order against the defendant for specific performance of a building agreement under the following circumstances. The plaintiffs, who are the Corporation of Wolverhampton, were possessed of a piece of land abutting on a street in that borough, called Canal Street, upon which they were desirous of having new buildings erected for the improvement of the town, and also for the purpose of increasing the rateable value of the property. The defendant, who was desirous of engaging in a building speculation, purchased this piece of land, and in the conveyance by which it was conveyed to him he covenanted that he would commence to erect a building or buildings thereon, of a certain minimum height, within twelve calendar months from May 25, 1897, and would complete the same within two years from that date. The defendant not proceeding to erect buildings in accordance with his covenant, a correspondence took place between the parties, in the course of which the defendant was pressed by the plaintiffs to carry out his covenant, and he asked for, and from time to time obtained, further time, promising that he would proceed to do so. That correspondence was put in at the trial, and the conclusion arrived at, I think rightly, by Wills J. with regard to its effect was that it resulted in a clear and definite agreement on the part of the defendant that, in consideration of his being allowed further time for the performance of his obligation in the matter, he would proceed to erect eight houses on the land purchased by him in accordance with plans submitted to and approved by the public works committee of the corporation, shewing the particulars of the houses to be erected. He failed to perform this agreement, and thereupon the plaintiffs brought their action

(1) 4 Hare, 506.

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A. L. Smith M.R.

for specific performance, claiming in the alternative damages. At the trial before my brother Wills J. and a jury, the main claim of the plaintiffs throughout the case appears to have been for specific performance. I should think that it would have been hopeless to ask for specific performance if the case had rested solely upon the original covenant in the indenture of July 31, 1897; but, as I have said, the learned judge was of opinion, when he came to consider the question whether specific performance could be ordered, that, though the original covenant did not sufficiently specify the buildings to be erected, there was a subsequent agreement in substitution for that covenant, by which the defendant bound himself absolutely to erect certain houses, of which the details were sufficiently specified for the purposes of an order for specific performance; and he dealt with the case on the footing that the claim was for specific performance of that agreement. The jury being there, he directed them to assess the damages provisionally, in case, on consideration of the authorities, the contract should turn out to be one of which specific performance could not be ordered. The jury assessed the damages at 50*l.*, but ultimately the learned judge came to the conclusion that an order for specific performance should be made, and gave judgment accordingly. The question, therefore, is whether the case is one in which an order for specific performance can be made. The authorities to which reference has been made appear to me to shew that, where there is a definite contract, by which a person, who has acquired land in consideration thereof, has agreed to erect on the land so acquired a building, of which the particulars are clearly specified, and the erection of which is of an importance to the other party which cannot adequately be measured by pecuniary damages, that is a case in which, according to the doctrine acted upon by Courts of Equity in relation to such matters, specific performance ought to be ordered. If a man has contracted to build a house on a piece of land according to certain detailed plans, and has obtained a conveyance of the land on the terms that he will do so, why should he be allowed to turn round and refuse to perform that contract, especially where damages will not

compensate the person with whom he has contracted? In the judgment of Kay L.J. in *Ryan* v. *Mutual Tontine Westminster Chambers Association* (1), after stating that ordinarily the Court will not enforce specific performance of building works because damages are generally in such cases an adequate remedy, and the Court cannot superintend such works—of which last objection I have never seen the force—he said: "An exception to this rule has been established in cases where a railway company has taken lands from a landowner on the terms that it will carry out certain works." Here the defendant has taken land from the plaintiffs on the terms that he will erect buildings. The learned Lord Justice proceeded: "In those cases, because damages are not an adequate remedy, the Court has gone to great lengths, and has granted specific performance of the definite works—they must be definite works—which the company that has taken the lands has contracted to do." In the present case I agree with the learned judge that, though the original covenant did not specify the buildings to be erected, the plans referred to by the subsequent agreement define the work to be done sufficiently to enable the Court to make an order for specific performance. It is specially important to the plaintiffs as the sanitary authority for the borough of Wolverhampton that a piece of land like that in question should not be left vacant in the middle of the town, and that houses should be built upon it, which may be the subject of assessment to the rates. It appears to me that the value of their right to have houses erected by the defendant on the piece of land conveyed to him cannot adequately be estimated by pecuniary damages, and that such damages would not be adequate compensation to them for the breach by the defendant of his contract. For these reasons I come to the conclusion that the learned judge was perfectly right in granting an order for specific performance in this case, and that the application must be dismissed.

COLLINS L.J. I am of the same opinion. I must confess that I cannot altogether understand the principle upon which

(1) [1893] 1 Ch. 116, at p. 128.

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Collins L.J.

Courts of Equity have acted in sometimes granting orders for specific performance in these cases, and sometimes not. I think that possibly the explanation is that the Courts have not uniformly adhered to one principle in such cases. It looks to me as if the views of the Courts of Equity have gone through a process of development with regard to the subject. In early times they seem to have granted decrees for specific performance in such cases. Then came a period in which they would not grant such decrees on the ground that the Court could not undertake to supervise the performance of the contract. Later on again they seem to have attached less importance to this consideration, and returned to some extent to the more ancient practice, holding that they could order specific performance in certain cases in which the works were specified by the contract in a sufficiently definite manner. Whatever the exact principle of equity on the subject may be, I think it is clear on the authorities that the elements exist in this case which in previous cases of a similar kind have been held to justify the Court in making a decree for specific performance. In this case land was conveyed to the defendant by the plaintiffs, part of the consideration being the covenant by him to erect buildings on it; by the subsequent agreement the buildings to be erected were specifically defined in all particulars; and, having regard to the circumstances and the position of the plaintiffs, it appears to me that damages would not be an adequate compensation to the plaintiffs for the breach by the defendant of his contract. I think, therefore, that this is a case in which the Court has power to make an order for specific performance, and in which such an order ought to be made.

ROMER L.J. I also am of opinion that the judgment of Wills J. should be affirmed. The question, which is not free from difficulty, is whether, under the circumstances of this case, an order for specific performance should be made in favour of the plaintiffs. There is no doubt that as a general rule the Court will not enforce specific performance of a building contract, but an exception from the rule has been recognised. It has, I think, for some time been held that, in

order to bring himself within that exception, a plaintiff must establish three things. (1) The first is that the building work, of which he seeks to enforce the performance, is defined by the contract; that is to say, that the particulars of the work are so far definitely ascertained that the Court can sufficiently see what is the exact nature of the work of which it is asked to order the performance. (2) The second is that the plaintiff has a substantial interest in having the contract performed, which is of such a nature that he cannot adequately be compensated for breach of the contract by damages. (3) The third is that the defendant has by the contract obtained possession of land on which the work is contracted to be done. The rule on this subject is stated by Fry L.J. in his work on Specific Performance, 3rd ed. pp. 44, 45, in substantially the same terms as those in which I have just stated it. The question is whether the plaintiffs in this case have brought themselves within the exception so stated. In my opinion they have. The first question is whether the work, of which specific performance is claimed, is sufficiently defined. I think that it is. No doubt, by the original covenant contained in the conveyance of July 31, 1897, the defendant, although he covenanted to erect buildings, did not covenant to erect buildings which were defined in the sense in which I have used the term; and I think that, if the case had rested upon that covenant, the plaintiffs would have failed to obtain a decree for specific performance. But subsequently to July 31, 1897, under circumstances which may be gathered from the correspondence between the parties, it appears that a supplemental agreement was ultimately entered into, with reference to the defendant's obligation under the original covenant, whereby the defendant did for valuable consideration undertake to erect houses in accordance with certain plans. When those plans are looked at, it seems to me that the work which the defendant undertook to carry out was perfectly defined by them, or at any rate sufficiently defined for the purposes of the doctrine which I am considering. They shew the elevations and sections of the houses, and the form of them in every respect, and I think, though I do not say that would necessarily be essential, they

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sufficiently shew the materials of which the houses were to be constructed. This supplemental agreement was made, as I have said, for valuable consideration: it is in writing, being contained in the correspondence between the parties: and it is an agreement which sufficiently defines the works to be done to be capable of being enforced by a decree for specific performance. That being so, the first feature to which I have alluded, as essential to bring a case within the exception to the rule I have mentioned, exists in the present case. The next question is whether in this case the plaintiffs were interested in the performance of the contract in such a manner that damages would be no adequate compensation to them for the breach of it. To my mind they clearly were so interested. I do not see how it is possible adequately to estimate in money the loss which would be suffered by the plaintiffs, if the defendant's agreement to build these houses were not performed. The object of the plaintiffs, in requiring the defendant to enter into the contract to build on the land, obviously was to benefit the town, and to increase the rateable value of the property therein. That the improvement of this part of the town was a matter which they had in view, and which they deemed important, is shewn by the original deed of July 31, 1897, which, although it does not specify the exact character of the buildings to be erected, contains a covenant by the defendant that he will not build any building of which the elevation has not been previously approved by the public works committee of the corporation. It appears to me that under the circumstances the plaintiffs have such an interest in having the defendant's contract specifically performed that the breach of it is not capable of being compensated for by pecuniary compensation. The only question that remains is as to the existence of the third feature which I have mentioned as an essential in these cases—namely, whether the defendant obtained possession of the land on which the buildings were to be erected by means of the contract for their erection. Clearly he did. I therefore find that all the three matters which I have mentioned as essential to the plaintiffs' title to specific performance exist in this case. No case has been cited, and I

do not know of any, where, upon those three matters being shewn to the Court to exist, a decree for specific performance has been refused. On the other hand we have the case of *Cubitt* v. *Smith* (1), which, so far as I know, has never been dissented from by any Court. Primâ facie, therefore, at any rate the plaintiffs are in my opinion entitled to specific performance of the defendant's contract. Then, are there any good reasons why the Court should not grant the plaintiffs that remedy? I cannot see that any reason has been put forward for the defendant which affects the plaintiffs' right, or which ought to induce the Court to refuse to make an order for specific performance. It is urged that the defendant will have to make a large expenditure in performing his contract, which may not prove remunerative. What have the plaintiffs to do with that? The defendant knew, or ought to have known, what he was binding himself to do when he entered into the original covenant of July 31, 1897. I must say that, if ever there was a case in which the conduct of the defendant was such that the Court ought not to shew any indulgence in the matter of ordering specific performance, it is the present case, the defendant having again and again obtained indulgence from the plaintiffs on representations that he was about to perform his contract, whereas in the result it appears that he cannot be made to perform it at all without the intervention of the Court. For these reasons I think that the appeal should be dismissed.

Application dismissed.

Solicitors for plaintiffs: *Sharpe, Parker & Co., for H. Brevitt, Wolverhampton.*

Solicitor for defendant: *J. Mitchell, for R. A. Willcock & Taylor, Wolverhampton.*

(1) 11 L. T. 298.

E. L.

1901
Feb. 1.

PEARL LIFE ASSURANCE COMPANY, LIMITED, APPELLANTS *v.* SCOTTISH LEGAL LIFE ASSURANCE SOCIETY, LIMITED, RESPONDENTS.

Insurance—Life—Transfer to another Company—Notice of Transfer—Person sought to be Transferred—Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 *Vict. c.* 26), *s.* 4, *sub-s.* 2; *s.* 14, *sub-s.* 1.

The respondents, a collecting society within the Collecting Societies and Industrial Assurance Companies Act, 1896, were charged, under s. 14, sub-s. 1, with failing to give notice to the appellants, an industrial assurance company within the same Act, of an application of a person insured with the appellants for admission to the respondent society, contrary to s. 4, sub-s. 2. A collector, who had collected for the appellants, asked the assured to transfer to the respondents. The assured signed a proposal form in the respondent society, and gave up to the collector his policies in the appellant company, receiving policies in the respondent society. The collector had left the appellants and become collector to the respondents. No notice was given.

The magistrate held that, as the policies in both societies were co-existent, there could be no legal transfer, or seeking to transfer, within the Act, and therefore no offence had been committed.

On a case stated:—

Held, that the assured was a person sought to be transferred, within the meaning of s. 4, sub-s. 2, and s. 14, sub-s. 1, and therefore the respondents had committed an offence under the Act.

CASE stated by an alderman of the City of London.

An information was preferred by the Pearl Life Assurance Company, Limited, the appellants, against the Scottish Legal Life Assurance Society, Limited, the respondents, charging them with not giving notice to the appellants of an application of one William Perkins, a person insured with the appellant company, for admission to the respondent society, contrary to the Collecting Societies and Industrial Assurance Companies Act, 1896. (1)

(1) 59 & 60 Vict. c. 26. By s. 4, sub-s. 1, "A member of or person insured with a collecting society or industrial assurance company shall not" (with certain exceptions not here material) "become or be made a member of or be insured with any other such society or company without

The appellant company was "an industrial assurance company," and the respondent society "a collecting society," within the meaning of the Act, and duly registered under the Friendly Societies Acts. Perkins and his wife had been insured in the office of the appellant company about two years, and a collector named Jones, whom he had known as collector for the company, in or about June, 1900, asked him to transfer to the respondent society. He assented to this, and on June 20 he signed a proposal form in the respondent society, and gave up to the collector Jones his books and policies in the appellant company, receiving in lieu of them policies in the respondent society. At the time this transaction took place Jones had left the appellant company, and had become a collector of the respondent society. The assistant superintendent of the respondent society afterwards stated to a witness that Perkins's insurances had been transferred to the respondent society. No notice was given by the respondent society to the appellant company within s. 4, sub-s. 2, of the Act. The policies on the lives of Mr. and Mrs. Perkins in the appellant company remained in existence, and were in existence at the date of the information. The appellant company admitted that it was not their wish or intention to cancel the policies.

It was contended on behalf of the respondent society that no offence had been committed under the statute, s. 4 being intended only as a protection to policy-holders, to protect them in the event of the industrial assurance company or collecting society transferring its business, or a portion thereof, to some other industrial assurance company or collecting society, and that, as the policies in both societies were in existence, there was no legal transfer or seeking to transfer within the meaning

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his written consent, or, in the case of an infant, without the consent of his father or other guardian."

By sub-s. 2, "The society or company to which the member or person is sought to be transferred shall, within seven days from his application for admission to that society or company, give notice thereof in writing to the society or company from which he is sought to be transferred."

By s. 14, sub. 1, "It shall be an offence under this Act if— . . . . (*c*) a collecting society or industrial assurance company to which a member or person is sought to be transferred fails to give such notice as is by this Act required."

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of the Act. The alderman held that, as the policies in both societies were co-existent, there could be no legal transfer or seeking to transfer within the meaning of the Act, and dismissed the information.

Avory, K.C. (*Rowsell* with him), for the appellants. The decision of the alderman was wrong. Perkins was a person sought to be transferred, within the meaning of s. 4, sub-s. 12, and s. 14, sub-s. 1, of the Act, and therefore the respondent society, in not giving the notice required by s. 4, sub-s. 2, were guilty of an offence under s. 14, sub-s. 1, and ought to have been convicted.

Cohen, K.C. (*J. B. Matthews* with him), for the respondents. The facts stated do not bring the case within the words of the statute. No offence was committed, and therefore in the result the decision was right.

Avory, K.C., was not heard in reply.

WILLS J. I am of opinion that the alderman has come to an erroneous conclusion in this case. The Act of Parliament is not very artificially drawn. Probably the language used is understood by the class of persons who are most concerned with dealings under the Act; but, however this may be, it is clear that the language used in the Act is popular rather than artificial. One knows that frauds are frequently perpetrated in transactions of this kind, and s. 4 is intended to check the proceedings of the people who carry out these frauds. The first check is imposed by sub-s. 1: in order that there may be evidence of a transfer, the written consent of the person to be transferred is required. As to sub-s. 2, the meaning of that sub-section is not capable of much doubt; it provides that "The society or company to which the member or person is sought to be transferred shall, within seven days from his application for admission to that society or company, give notice thereof in writing to the society or company from which he is sought to be transferred." The result of proceedings of this nature often is that there may be two policies on foot at the same time for a short period. In such a case I

think it would be very likely that the agent would pay the small premiums himself for the few weeks remaining up to the end of the current year, and as soon as the current year ends would let the policy drop in the society which he was leaving, and would continue the policy in the other society. It is enacted, therefore, that any attempt to transfer shall be notified. If I am right as to the meaning of s. 4, sub-s. 2, it is clear that there was an offence in the present case, and the respondent society ought to have been convicted.

PHILLIMORE J. I am of the same opinion. The clause is strange and strangely worded. I agree with Mr. Cohen that the object of s. 4. sub-s. 1, may be to protect a man from being transferred by an agent to another company without his own consent. As to sub-s. 2, I rather doubt whether it was intended to protect the assured. I rather incline to the view that it was intended to protect the company against their own servants in cases where the agent of one company goes off to another company. In any case the words of the section shew plainly that a person whom an agent seeks to transfer from one company to another is not to be treated like a bale of goods, and transferred without his own consent.

Appeal allowed. Case remitted for conviction.

Solicitors for appellants: *Hicklin, Washington & Pasmore.*
Solicitor for respondents: *W. H. Court.*

P. B. H.

1901
Feb. 9.

LUMLEY *v.* OSBORNE.

County Court—Practice—Judgment against Firm—Affidavit for leave to issue Judgment Summons against Partner—County Court Rules, App. H, Form 52 (*c*).

By the County Court Rules, Order xxv., r. 14 (*b*), it is provided that where a judgment is recovered against a firm, and the plaintiff seeks to enforce it by judgment summons against a person whom he alleges to be a partner in the firm, he shall file an affidavit in Form 52 (*c*), and thereupon a judgment summons shall issue. Paragraph 2 of Form 52 (*c*) is as follows: "I am informed and believe [*state the sources of information and grounds of belief*] that G. H. was at the date of judgment a partner in the said firm of C. D. & Co." :—

Held, that the statement of the plaintiff's sources of information and grounds of belief that the person against whom the judgment summons is sought was a partner is a material part of the form, and that its omission from the affidavit will render irregular the issue of the summons and all subsequent proceedings thereon.

PROHIBITION to county court of Croydon.

The action was brought in the High Court against a firm of Osborne & Co. to recover a sum of 36*l.* 10*s.* 4*d.*, and the writ was served upon the applicant J. H. Osborne as manager of the firm. Judgment was recovered against the firm by default. With the object of enforcing the judgment by judgment summons against J. H. Osborne, the plaintiff then filed an affidavit in the Croydon County Court under Order xxv., rr. 14 (*b*) and 17 (*b*) of the County Court Rules, 1889, alleging that he was informed and believed that the said J. H. Osborne was a partner in the firm of Osborne & Co., but the affidavit did not correctly follow Form 52 (*c*) (1) in the Appendix H, in that it omitted to state the plaintiff's sources of information and grounds of belief. Upon that affidavit a judgment summons was issued against J. H. Osborne. Upon the hearing of that

(1) Form 52 (*c*) in Appendix H to the County Court Rules, 1889, headed "Affidavit for leave to issue a judgment summons on a judgment or order against a firm" . . . .

Paragraph 2: "I am informed and believe [*state the sources of information and grounds of belief*] that G. H. [*state name, residence and occupation*] was at the date of the judgment [*or order*] a partner in the said firm of C. D. & Co., &c."

summons the county court judge found that J. H. Osborne was a partner in the firm of Osborne & Co., and that he had, since the date of the judgment in the High Court, means to satisfy the amount of the judgment debt, and he accordingly ordered him to be committed to prison for a period of forty-two days. J. H. Osborne then moved the Divisional Court for a writ of prohibition to the county court judge to prohibit him from further proceeding upon the said order of committal.

S. R. Earle, for the applicant. The judge had no jurisdiction to make the order. There is no machinery by which to enforce by judgment summons against an alleged partner a judgment recovered against a firm in the High Court. Rule 14 (*b*) of Order XXV., under which the plaintiff proceeded, applies only to judgments recovered in the county court. The effect of rule 17 (*b*) is not to extend the procedure of rule 14 (*b*) to judgments recovered in the High Court. But if it purports to do so it is ultra vires, for s. 63 of the County Courts Act, 1888, provides that "no action shall be brought in the Court on any judgment of the High Court," and an application for a judgment summons is an action. But at any rate the affidavit on which the summons was issued was informal, for it did not state the plaintiff's sources of information and grounds of belief that J. H. Osborne was a partner. That statement is matter of substance, and its omission renders the whole subsequent proceedings irregular. In *McIntosh* v. *Simpkins* (1) it was held that it was essential that these forms should be followed in all material particulars. In *In re J. L. Young Manufacturing Co.* (2) the Court of Appeal laid down the general rule that an affidavit of information and belief not stating the source of the information and belief is irregular.

Whateley, for the plaintiff. The county court judge had jurisdiction. Rule 17 (*b*) expressly applies the provisions of r. 14 (*b*) to the case of a judgment obtained in the High Court. There is no ground for suggesting that the former rule was not within the powers of the Rule Committee. An application in the county court for a judgment summons on a judgment

(1) Ante, p. 487. (2) [1900] 2 Ch. 753.

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obtained in the High Court is not an action, for the proceeding is not commenced by plaint. Then as to the alleged irregularity of the affidavit, the omission was not in a vital and material part of the form within the decision of *McIntosh* v. *Simpkins*. (1)

Earle, in reply.

WILLS J. This is an appeal from an order of the county court judge of Croydon committing the appellant to prison under s. 5 of the Debtors Act, 1869. That section provides that, "Subject to the provisions hereinafter mentioned, and to the prescribed rules, any Court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court." And by s. 10, "prescribed" means "as respects the county courts, prescribed by general rules to be made under the County Court Act, 1856." At the time when that Act was passed there was no such thing as suing the members of a firm in the firm name. And when the new practice of so suing a firm came to be introduced, it became necessary, before a judgment could be enforced against an alleged partner by judgment summons, to institute an inquiry as to whether the person in question was a partner or not. Provision is made for that in the county court by the "prescribed rules" made under s. 164 of the County Courts Act, 1888, which section says that the power of making rules "shall extend to all matters of procedure or practice, or relating to or concerning the effect or operation in law of any procedure or practice in any case within the cognizance of county courts as to which rules of the Supreme Court have been or might lawfully be made for cases within the cognizance of the High Court of Justice." The rule made under that section which deals with this matter is r. 14 (*b*) of Order XXV. Now, I think it undoubted that, though in 1869 there was no power to get judgment against a firm and then enforce it against the partners, it was within

(1) Ante, p. 487.

the competence of the Rule Committee to make that rule. The language of the Act of 1869 is perfectly general, and must be read as intended to apply to any new procedure which should be introduced by subsequent legislation. It is true that the effect of that rule is to make the procedure somewhat summary, for instead of having two summonses, one to ascertain whether the person sought to be affected by the order was a partner at the date of contract sued on, or whatever the cause of action may be, and a subsequent one to ascertain whether the case is a proper one for committal, both those matters are directed to be dealt with in one summons. But I think the procedure is not at all unreasonable, for one must assume that the county court judge will exercise his jurisdiction in a reasonable manner; and an important object that had to be kept in view in making these rules was to diminish expense. The rule enables the judge to say that, the defendant having been found to have been a partner, the judgment recovered against the firm bound him as from the date when it was pronounced, and that consequently, if he had the means to satisfy that judgment at any time after that date, there is in general good ground for committing him to prison. I see nothing unreasonable in that; for I suppose that in the majority of cases in the county court in which the fact of partnership is disputed it is disputed fraudulently, and with the sole object of delaying the execution of the judgment. Therefore, assuming that the procedure indicated by the rules was correctly followed, I am of opinion that the county court judge in the present case had jurisdiction to make the order complained of.

But I am of opinion that the procedure was not correctly followed. Order XXV., r. 14 (*b*), says that the person seeking to enforce the judgment against an alleged partner shall file an affidavit in the form in the Appendix—Form 52 (*c*)—and according to that form he is to "state the sources of information and grounds of belief" that the person against whom the summons is sought was a partner in the firm. It seems to me that that is a material and essential part of the form, the object being that the person alleged to be a partner shall be given notice of the case that he has to meet and have an

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opportunity of producing witnesses to rebut it. In the present instance the affidavit was defective in that it did not state the plaintiff's sources of information and grounds of belief, and the issue of the judgment summons was consequently irregular. That irregularity not having been waived, the judge had no jurisdiction to make the order which is complained of.

CHANNELL J. I am of the same opinion.

Order for prohibition.

Solicitor for plaintiff: *W. Hood.*
Solicitors for J. H. Osborne: *Croft & Mortimer.*

J. F. C.

1901

Jan. 25, 29; *Feb.* 9.

DULANEY AND OTHERS *v.* MERRY & SON.

Conflict of Laws—Assignment for Benefit of Creditors—Deed executed Abroad—Title to Goods in England—Registration—Deeds of Arrangement Act, 1887 (50 & 51 *Vict. c.* 57).

A trustee under a deed of assignment for the benefit of creditors, executed by a foreign debtor in the country of his domicil, and valid by the law of that country, can establish in the Courts of this country a good title, as against an execution creditor, to goods in this country, belonging, at the date of the assignment, to the debtor, although the deed has not been registered pursuant to the Deeds of Arrangement Act, 1887.

INTERPLEADER ISSUE tried before Channell J. without a jury.

The material facts are fully stated in the judgment.

Jan. 25, 29. *Danckwerts, K.C.*, and *A. H. Carrington*, for the plaintiffs. The maxim "Mobilia sequuntur personam" is applicable to the present case: *Sill* v. *Worswick*. (1) Therefore the right to these goods is governed by the law of the domicil of the owners, and as the deed of December 18, 1899, was valid according to the law of Maryland, where the owners of the goods were domiciled, the effect of the deed was to transfer the property in the goods to the plaintiffs. The Deeds

(1) (1791) 1 H. Bl. 665; 2 R. R. 816.

of Arrangement Act, 1887, does not apply, and the deed did not require registration. There is nothing in the Deeds of Arrangement Act which can be read as, or have the effect of, a prohibition of the transaction in Maryland. The word "debtor" in that Act must be taken to mean a debtor who is subject to the bankruptcy law of this country. The provision in s. 6, sub-s. 2, requiring the production of the original deed, is inconsistent with the application of the Act to foreign deeds.

M. J. Muir Mackenzie and *T. Willes Chitty*, for the defendants. The maxim "Mobilia sequuntur personam" is subject to the exception, that where the transfer of personal property is in question the "lex loci" prevails: Story on Conflict of Laws, ss. 423*a*, 550; *Alcock* v. *Smith*. (1) The provisions of s. 5 of the Deeds of Arrangement Act, 1887, avoiding deeds of arrangement unless registered, are positive, and apply to the present case—at least, so far as relates to goods which are in this country, though it may be that the Act does not affect transactions in foreign countries, and that s. 5 should be read as if the words were "shall be void as to goods in this country." This is a more reasonable construction than that suggested on behalf of the plaintiffs.

[In addition to the authorities which are dealt with in the judgment, the following were referred to: *Stein's Case* (2); *Holmes* v. *Remsen* (3); *De la Vega* v. *Vianna* (4); *Don* v. *Lippmann* (5); *Ex parte Pollard, In re Courtney* (6); *Donaldson* v. *Ord* (7); *Liverpool Marine Credit Co.* v. *Hunter* (8); *Ex parte Melbourn, In re Melbourn* (9); *Coote* v. *Jecks* (10); *Ex parte Crispin, In re Crispin* (11); *Ex parte Games, In re Bamford* (12); *In re Artola Hermanos, Ex parte André Châle* (13); *Roberts* v. *Jones* (14); *In re Pearson, Ex parte*

(1) [1892] 1 Ch. 238, at p. 267, per Kay L.J.
(2) (1813) 1 Rose, 462.
(3) (1820) 4 Johns. Ch. (N. Y.) 460, at p. 485.
(4) (1830) 1 B. & Ad. 284; 35 R. R. 298.
(5) (1837) 5 Cl. & F. 1.
(6) (1840) Mont. & Ch. 239.
(7) (1855) 17 D. 1053.
(8) (1868) L. R. 3 Ch. 479.
(9) (1870) L. R. 6 Ch. 64.
(10) (1872) L. R. 13 Eq. 597.
(11) (1873) L. R. 8 Ch. 374.
(12) (1879) 12 Ch. D. 314.
(13) (1890) 24 Q. B. D. 640.
(14) [1891] 2 Q. B. 194.

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Pearson (1); *North Western Bank* v. *Poynter, Son & Macdonalds* (2); *In re Clark, Ex parte Clark* (3); *Hedges* v. *Preston.* (4)]

Cur. adv. vult.

Feb. 9. The following written judgment was delivered by

CHANNELL J. This was an interpleader issue, tried before me without a jury, and it raises a difficult question, as to whether the plaintiffs, who are trustees under a deed of assignment for the benefit of creditors, executed by foreign debtors in the country of their domicil, can establish in the Courts of this country a good title, as against execution creditors, to goods in this country, belonging at the date of the assignment to the debtors, without the deed of assignment being registered pursuant to the Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57).

The facts are not in dispute, and are as follows. Christian Devries and Minnie Devries, his wife, carried on business as partners under the style of the "Charles A. Vogeler Company," as manufacturers and vendors of drugs and patent medicines. They were domiciled in the State of Maryland. They carried on business at Baltimore, and also in London, Paris, and Sydney, and elsewhere. Their business in London was managed for them by a manager. They resided at Baltimore and, so far as appears, have never even been in England. By deed, dated December 18, 1899, and executed at Baltimore, Christian and Minnie Devries assigned all their estate, real and personal and mixed and wheresoever situated, to Henry S. Dulaney (who also was domiciled in Maryland), for the benefit of their creditors. Dulaney afterwards petitioned the Circuit Court of Baltimore City, and obtained authority to "administer his trust under the authority of that Court." Subsequently the other plaintiffs in the present issue were duly appointed co-trustees with Dulaney. They also are domiciled in Maryland.

It was proved before me by the evidence of experts that the

(1) [1892] 2 Q. B. 263.
(2) [1895] A. C. 56.
(3) [1898] 1 Q. B. 20.
(4) (1899) 80 L. T. (N.S.) 847.

deed was good according to the law of Maryland, and that the property became duly vested in Dulaney; that this was effected by the operation of the deed, that is, by the act of the parties and not of the Court, and that the proceedings in Court were analogous to the administration of an estate in our Courts of Chancery, and operated to give protection and indemnity to the trustee; that the deed could have been impeached within a limited time by bankruptcy proceedings in Maryland, but that the period had elapsed without any such proceedings having been taken, and that the deed was consequently now unimpeachable in Maryland; that under the deed, and also under the bankruptcy law now established in Maryland, local creditors would have no preference over foreign creditors, and that English creditors and other foreign creditors would rank pari passu with the American creditors in the administration of the estate under the deed.

It further appeared that, after the execution of the deed, proceedings were taken under the bankruptcy law of this country to make the "Charles A. Vogeler Company" bankrupts, on the ground, amongst others, that the execution of the deed was an act of bankruptcy; that it had been held by the Court of Appeal, and ultimately by the House of Lords, that there was no jurisdiction to adjudicate them bankrupts, as they were domiciled foreigners who had not brought themselves within the jurisdiction of our Courts, and that they had not committed an act of bankruptcy available here by the execution of the deed abroad. The decision of the Court of Appeal is reported under the name of *In re A. B. & Co.* (1), and the decision of the House of Lords has been reported in the name of *Cooke* v. *Charles A. Vogeler Co.* (2), since the argument before me. An interim receiver was appointed in those bankruptcy proceedings, but on February 28, 1900, after the decision of the Court of Appeal, the receiver gave up possession of the goods of the Charles A. Vogeler Company in this country to one Buffham, the agent in this country of the plaintiffs, the trustees under the deed, acting under power of attorney from them. On March 5, 1900, the

(1) [1900] 1 Q. B. 541. (2) [1901] A. C. 102.

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defendants in this issue, who had obtained judgment against the Charles A. Vogeler Company, caused execution to be levied on the goods so in the possession of Buffham, under a writ of execution which had been delivered to the sheriff on the same day. The usual interpleader proceedings were taken, and I now have to decide whether the plaintiffs have a good title as against the defendants, the execution creditors. The deed of arrangement was never registered in this country under the Deeds of Arrangement Act, 1887, and it seems clear that this non-registration is the only difficulty which stands in the plaintiffs' way. But for this statute the deed is clearly sufficient to pass the property, according to the law of this country as well as according to the law of Maryland. Mr. Muir Mackenzie did, at the commencement of the case, suggest that the deed might be bad under the statute of Elizabeth, but he withdrew this point when it became clear, on the evidence of the experts, that the foreign law applicable to the deed gave no preference to native over foreign creditors. Mr. Danckwerts, for the plaintiffs, relied on the maxim "Mobilia sequuntur personam," and quoted amongst other authorities the judgment of Lord Loughborough in *Sill* v. *Worswick* (1), where he says: "It is a clear proposition, not only of the law of England, but of every country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that is not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession." But, although this is the general rule, it is perhaps somewhat too broadly stated in this dictum; at all events the rule is subject to exceptions. I was referred by Mr. Muir Mackenzie to a passage in Story's Conflict of Laws—s. 423 *a*—which, after

(1) 1 H. Bl. 665, at p. 690; 2 R. R. 816.

stating the law as to movables, and that their disposition and the adjustment of priorities and privileges in reference to them follows the law of the domicil of their owner, proceeds: "Exceptions may doubtless exist, where the law of the country in which either movable or immovable property is situate, prescribes a different rule, which must then be obeyed." Again, in s. 550, it is said: "A nation within whose territory any personal property is actually situate has as entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there. It may regulate its transfer, and subject it to process and execution, and provide for and control the uses and disposition of it, to the same extent that it may exert its authority over immovable property." The exceptions to the general rule are somewhat similarly stated in several modern text-books, but the authorities in point are few. I find, however, that Kay L.J., in *Alcock* v. *Smith* (1), says: "As to personal chattels, it is settled that the validity of a transfer depends, not upon the law of the domicil of the owner, but upon the law of the country in which the transfer takes place. Our own law as to distress and market overt is illustrative of this. The goods of a foreigner distrained in a house tenanted by an Englishman in this country may be sold for the tenant's rent, and the purchaser acquires a perfect title, whatever may be the law of the owner's domicil. So the goods of a foreigner sold here in market overt by one who had no title to them could not be recovered from the purchaser. In both cases the property would pass to him by our law." For this he quotes *Cammell* v. *Sewell* (2), a case in which a sale in Norway, good according to the law there, of the goods of an Englishman, was held good also by our Courts.

It seems clear that a transfer of movables here good by our law would here be held good, notwithstanding that it might not comply with formalities required by the law of the domicil of the owner, but there has not been quoted to me, nor have I found, any clear case of a transfer, good according to the law

(1) [1892] 1 Ch. 238, at p. 267; 61 L. J. (Ch.) 161, at p. 170.

(2) (1858) 3 H. & N. 617; affirmed (1860) 5 H. & N. 728.

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of the domicil of the owner, and made there, but held bad for not conforming to the law of the country where the goods are situate. Of course registered stock, such as Consols, can only be transferred according to the regulations under which the register is kept, but this, though possibly an illustration of the rule laid down by Kay L.J., seems to depend on the special nature of the property. Some cases also were quoted by Mr. Muir Mackenzie which appear to be illustrative merely of the rule that the lex fori must govern all questions of procedure and of the form of the remedy. The instance which most clearly shews how far the law of each country is applicable is that of a will. If the surviving partner of this Baltimore firm had died leaving a will, the validity of that will would depend on Maryland law. If one witness were sufficient by that law we should hold a will so witnessed good, although our law requires two witnesses. But, although we should recognise the title of the executor under the foreign will, we should require him to take out probate here, and should not allow him to deal with goods in this country without taking probate. This is a distinct instance in which our law, while recognising the foreign disposition of movables, requires something further to be done here before it is acted on, but the case is probably to be accounted for by the probate being the only evidence of the title of the executor which our Courts recognise, and is part of the lex fori necessarily applicable. On this part of the case, therefore, although no very distinct authority, other than the passage in Story, can be found, I cannot doubt that Mr. Muir Mackenzie is right in saying that it is within the competence of the Legislature of this country to enact rules as to the passing of property situated in this country, and to say that the property in goods situated here, which has been dealt with by foreign owners in accordance with the law of their domicil, shall not pass by such dealing unless certain formalities, imposed by our law, are also complied with; and, indeed, Mr. Danckwerts does not dispute that, if our law does prohibit the transaction which he relies on in this case, effect must be given by our Courts to the prohibition, though he contends, as I understand him, that our law is to be disregarded unless it

goes the length of prohibiting the foreign transaction. The question I have to decide, therefore, seems to reduce itself to one of construction of the Act of 1887. But in order to arrive at that construction we must proceed in the way very clearly defined by the Lord Chancellor in the House of Lords in *Cooke* v. *Charles A. Vogeler Co.* (1) I may paraphrase the language and say, "If the law has intended, and has expressed its intention, that a deed executed abroad by a foreigner shall be registered before it can pass property situate in this country, no Court has any jurisdiction to disregard what the Legislature has enacted. And if, on the other hand, it is manifest that the language of the statute does not reach the case supposed, no Court has jurisdiction to enlarge the ambit of English legislation beyond what the Legislature has permitted." It is necessary carefully to consider the Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57). The object of the Act appears to be to secure to creditors information concerning private arrangements outside bankruptcy, by making it necessary to register the deeds, and to file an estimate of assets and liabilities. Creditors thus become in a position to exercise their option of coming in under the deed, or of treating it as an act of bankruptcy and having the estate administered in bankruptcy. Deeds acquire no validity by the fact of their registration, and deeds to which the Act applies would, if executed by a debtor subject to our bankruptcy law, be acts of bankruptcy. The Act, therefore, seems to be supplementary of the law of bankruptcy, and we expect to find it made applicable to the same persons as the bankruptcy laws. The decision of the House of Lords shews that the word "debtor" in the Bankruptcy Acts is to be confined to debtors who are subject to the English bankruptcy laws, and I have come to the conclusion, though not without much doubt, that this Act must be limited in a similar way. If the Act applies to deeds executed by debtors not subject to our bankruptcy laws, its effect would be to enable the first creditor who puts in an execution to get paid in full without the other creditors having any means of securing a rateable distribution of assets, for the deed would not be

(1) [1901] A. C. 102, at p. 107.

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available as an act of bankruptcy, as shewn by *Cooke* v. *Charles A. Vogeler Co.* (1), and the suffering a levy by execution and sale would not be an act of bankruptcy, as shewn by *Ex parte Blain, In re Sawers.* (2) This result would be anomalous, and, I think, unjust, but nevertheless it may be the true construction of the statute, and some further examination of the enacting words is necessary. The first matter commented on before me was the 2nd section: "This Act shall not extend to Scotland." A similar clause in the Bankruptcy Act was also commented on in the case in the House of Lords, and I cannot say that it has no bearing on the point, but I myself attach very little weight to it. I think this section merely means that it is not intended by the Act to alter the law of Scotland. We have but one Legislature to enact the laws for England and for Scotland, but the laws of the two countries are very different, and even when it is desired to make a law to take effect both in England and in Scotland it is often impracticable, by reason of this existing difference in the laws of the two countries, to make the alterations in the law of both by the same Act of Parliament. Moreover, the law of Scotland might, so far as I know, in 1887 have already included provision for the registration of deeds, or something which would obviate the mischiefs intended to be remedied in England by the Act of 1887. Passing on, the 4th section defines the deeds, to which the Act is to apply, as including deeds (afterwards again specified) made by or in respect of the affairs of a debtor for the benefit of his creditors generally, otherwise than in pursuance of the law for the time being in force relating to bankruptcy. The reference here to the laws of bankruptcy is, of course, accounted for by the fact that the Bankruptcy Act then in force, as well as a prior Act and also a subsequent one, have provided for deeds being executed in certain cases, and registration of such deeds was, of course, unnecessary, but the reference seems to assume the debtor to be one subject to the bankruptcy law. If "debtor" is read in this section in the same way as the House of Lords read it in *Cooke* v. *Charles A. Vogeler Co.* (1), the present deed would not be within the Act.

(1) [1901] A. C. 102. (2) (1879) 12 Ch. D. 522.

The 5th section enacts that a deed to which the Act applies shall be void unless registered within a limited time. Now it could not have been intended that such a deed as the present should be void altogether. It must operate on the goods in Baltimore, and the Legislature never could have intended to enact to the contrary. It is necessary, therefore, to read this section with some limitation, and Mr. Muir Mackenzie asks me to read it "void as to goods in this country." The next words in the 5th section go on to shew that it is contemplated that a deed to which the Act applies may be executed out of England or Ireland, but these words are required to meet the case of an absconding debtor, subject to our bankruptcy laws, who goes abroad and then executes a deed for the benefit of his creditors. The period for registration is undoubtedly so short as to be very inconvenient if it is to apply to a deed such as the present, which goes a little to shew that such a deed was not contemplated, but this difficulty might perhaps be met in practice by s. 9. Then s. 6, sub-s. 2, provides that the original deed is to be produced, and that it is to be stamped with an ad valorem stamp on the value of the property passing by it. The production of the original of a foreign deed would almost always be inconvenient and sometimes impossible. Mr. Danckwerts pointed out that by the law of many foreign countries the original of a deed is in a notary's book and is kept by him, and that the parties get nothing but notarial copies. One would think that, if foreign deeds were to be included, the production of the original would be dispensed with by the Act. Further, if the Act were intended to apply to foreign deeds, the Legislature would have made the ad valorem stamp on the value, not of the whole property passing, but of that within the jurisdiction. Then the 13th section seems to assume that every debtor executing a deed to which the Act applies must have his place of business or reside either in the London bankruptcy district, or in Ireland, or else in some "county court district," that is to say, either in Ireland, England, or Wales—for, by the expression "county courts," English county courts which have bankruptcy jurisdiction are clearly meant, and not foreign courts. Thus, a critical examination of the words of the Act

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of Parliament seems to shew that the Legislature certainly had not in their contemplation a deed by foreign debtors operating on property abroad as well as on property here. The fact that the Legislature overlooked this particular case is, however, hardly enough to justify a Court in saying that it is not included. If the operative words of the Act in their ordinary meaning clearly included the case, and there were no legitimate principle by which those words could be qualified, the case must be held within the Act, notwithstanding that there was reason to think that it had been in fact overlooked by the Legislature. Here the operative words of the Act read shortly are "a deed made by a debtor for the benefit of his creditors shall be registered, and shall be void unless registered." Is there any legitimate way of reading these words so as not to include the deed of a foreigner? Besides the small matters in the Act on which I have commented, I think there is. Some limitation is required. The Act cannot mean that such a deed is to be void as regards the property situate abroad; as pointed out in the House of Lords all legislation is primarily territorial, and not intended to control persons not subject to the jurisdiction. It is, at least, as legitimate to read "debtor" as meaning "debtor subject to our jurisdiction" as it is to limit the word "void," and say it means "void as regards property within our jurisdiction." And when we find that in an Act in pari materia the word "debtor" does bear that meaning, I think it is more legitimate to put here the same limitation than a different one. I bear in mind Mr. Muir Mackenzie's observation that the House of Lords proceeded very much on the fact that bankruptcy affects the personal status, and that English legislation could not affect the status of foreigners, and although these domiciled foreigners never submitted themselves personally to the jurisdiction of an English Court, they did subject some of their goods to our English law by leaving them here, as the illustration of Kay L.J. as to the law of distress clearly shews. It would, therefore, be within the competence of the English Legislature to say that these foreigners should only transfer those goods by registered deed. But this Act is not an Act regulating the

transfer of property. It includes deeds of composition, or of inspectorship, where no property passes, and if, therefore, there is to be a limitation in the generality of the operative words in it, that limitation should be rather on the deeds that come within it than on the property. As the Act includes only some deeds, a limitation, which takes a class of deeds—those executed abroad by foreigners—out of the Act altogether, does less violence to the language of the Act than a limitation which makes some deeds, to which the Act does apply, void in part, when the Act says they are to be void altogether. On the whole it seems to me that, acting on the same principles as the House of Lords did, I am justified in putting on this Act the same limitation as they put on the Bankruptcy Act, and saying that "debtor" means "debtor subject to the Bankruptcy Acts." This interpretation has the advantage of preventing the unseemly scramble for the English goods of the foreign debtor, which would take place if this deed were held to be within the supplementary branch of the law of bankruptcy as to deeds for the benefit of creditors, and yet not within the general law of bankruptcy, so that the makers of the deed could be adjudged bankrupt. In the view I take there is no English law which requires this deed to be registered. Consequently, there is no lex rei sitæ to interfere with the operation of the maxim "Mobilia sequuntur personam." I therefore hold that the plaintiffs have established a good title against the execution creditors, and find the issue for the plaintiffs and with costs of the issue.

As to other matters, I do not know if I should make the necessary orders, or whether the case will go back to chambers, but if it is desired to appeal I think the money should stay in court, and the security for costs by the foreign plaintiffs should stand.

Judgment for plaintiffs.

Solicitor for plaintiffs: *J. Arscott Bartrum.*

Solicitors for defendants: *Gibbs, White & Strong.*

P. B. H.

C. A.

[IN THE COURT OF APPEAL.]

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Jan. 18, 24; *Feb.* 19.

PARSONS *v.* NEW ZEALAND SHIPPING COMPANY.

Ship—Bill of Lading—Description of Goods—"Marked and Numbered as in the Margin"—Mistake—Bills of Lading Act, 1855 (18 & 19 *Vict. c.* 111), *s.* 3.

By a bill of lading signed by the shipowners' agents goods shipped for carriage from New Zealand to London were described as a certain number of frozen carcases of lambs "marked and numbered as in the margin." The carcases were described in the margin of the bill of lading as bearing a certain mark and a number consisting of three figures. The mark indicated the quality of the carcase, as being of a particular brand; one figure of the number indicated approximately its weight; and the other two figures of the number were private marks of the shippers, which indicated certain particulars with regard to the carcase for their own purposes, but had no bearing on the nature, quality, or commercial value of the goods. The bill of lading contained a clause stating that the ship would not be responsible for correct delivery, unless each package was distinctly, correctly, and permanently marked by the merchant before shipment with a mark and number or address. The mark and number mentioned in the margin of the bill of lading were inserted by the shippers. On the discharge of the ship in London it was found that a portion of the carcases in fact shipped under the bill of lading bore a mark and number which corresponded with the description in the margin of the bill of lading as regards the mark, and the figure indicating weight, but which differed from that description as regards one of the figures forming the private marks of the shippers. An indorsee of the bill of lading for valuable consideration refused to take delivery of these carcases as forming part of his shipment, and sued the shipowners' agents for short delivery, relying on the provisions of the Bills of Lading Act, 1855, s. 3:—

Held, by the Court of Appeal (affirming the judgment of Kennedy J.), that the action was not maintainable.

By A. L. Smith M.R.: The case came within the clause of the bill of lading which exonerated the ship from responsibility for correct delivery unless the goods were correctly marked and numbered.

By Collins L.J. and Romer L.J., A. L. Smith M.R. dissenting: Inasmuch as the figure, in respect of which there was a discrepancy between the marginal description and the number on the carcases, did not affect or denote the nature, quality, or commercial value of the goods, the defendants were not precluded by s. 3 of the Bills of Lading Act, 1855, from shewing that there was a mistake in the marginal description, and that the goods refused by the plaintiff formed a portion of those in fact shipped under the bill of lading of which the plaintiff was indorsee.

APPEAL from the judgment of Kennedy J. in an action tried by him without a jury. (1)

(1) [1900] 1 Q. B. 714.

The action, which was for damages for short delivery, was brought by the plaintiff as the indorsee of two bills of lading given in respect of a quantity of frozen lambs' carcases shipped from Timaru in New Zealand for London, against the defendants, who were the agents in New Zealand for the owners of the steamship *Fifeshire*, in which the carcases were shipped, and who through their manager signed the bills of lading.

Each of the bills of lading described the goods included in it as "marked and numbered as in the margin." The body of one bill of lading gave a total of 1166 carcases, and the marginal description included the item "Sun Brand 488 X 226 carcases." The body of the other bill of lading gave a total of 1076 carcases, and the marginal description included the item "Sun Brand 622 X 608 carcases." Each of the bills of lading contained the following clause: "The ship will not be responsible for correct delivery, unless each package is distinctly, correctly, and permanently marked by the merchant before shipment with a mark and number or address." The marks and numbers were inserted in the margins of the bills of lading by the shippers from information given to them by their servants. By the terms of the bills of lading the shipowners' liability in case of loss or detention or injury to goods, for which they might be responsible, was to be calculated on, and in no case to exceed, the nett invoice cost. On the ship's arrival in London it was found that the full number of carcases marked and numbered as in the margin of the first bill of lading, as regards the figure 488, and of those marked and numbered as in the margin of the second bill of lading, as regards the figure 622, were not on board. But there were on board 21 carcases marked "Sun Brand 388 X" and 101 carcases marked "Sun Brand 522 X," which were not required by any other importer, and to which no bills of lading given in respect of cargo shipped on board the *Fifeshire* related, unless, as contended by the defendants, the bills of lading sued upon related to them. If these carcases were treated as carcases included in the two bills of lading, although incorrectly described in the marginal description as being marked "488" instead of "388" in one

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case, and "622" instead of "522" in the other, there was still a deficiency in the number of carcases available for delivery under the bills of lading. As to this deficiency, the defendants had paid an amount into court which the learned judge held to be sufficient, and no question arose on the appeal in relation thereto. The defendants tendered to the plaintiff the carcases marked Sun Brand 388 X and the carcases marked Sun Brand 522 X, alleging that they really formed part of his consignment, but were erroneously described in the margins of the two bills of lading, in the case of the former as "488" instead of "388," and in the case of the latter as "622" instead of "522." The plaintiff, however, refused to receive them as forming part of his consignment, contending that the defendants, who by their manager had signed the bills of lading, were by s. 3 of the Bills of Lading Act, 1855, precluded from denying that 226 carcases marked Sun Brand 488 X and 608 carcases marked Sun Brand 622 X were shipped under the bills of lading respectively. Kennedy J., upon the evidence before him, found the facts with regard to the carcases in dispute as follows:—

The "Sun Brand" is a registered brand of the shippers, the Christchurch Meat Company, Limited, under whose form of bill of lading, signed by the defendants' manager, the meat in question was shipped. That brand and the "X" denote quality. Of the three-figure numbering, whether 488, 388, 622, or 522, the final figure is important, because it denotes what may be called the classification of weight, as, e.g., 35–40 lbs., or as the case may be. The duplication of this figure, 88, 22, and so on, is a peculiarity of these shippers, to indicate both that the meat comes from their "factories," as the killing and freezing places appear to be called, and that the meat is their own property, and has not been frozen and shipped by them as agents for other persons. The first figure, as e.g. the 6 in 622 or the 4 in 488, simply records the date of killing and freezing, and so, for the purpose of his own accounts, it has its use or importance for the shipper, just as the duplication of the 2 or the 8 has; but neither the first figure nor the duplication of the following figure has, as I understand the evidence, any distinc-

tive value as regards the market for the meat. (1) In other words, and to sum up, given the "Sun Brand" and "X," and the final figure, the meat is, as a commercial article, absolutely unaffected in its character or value, whether it is marked 522 or 622, 488 or 388. Secondly, I find as a fact that in practice and according to the course of business in shipment, the only tally, at Timaru, made on behalf of the ship, is a tally of the number of carcases. The work proceeds rapidly, day and night, and no attempt is made to check the shippers' marks or numbers upon the individual carcases. The carcases are brought in insulated vans from the freezing store, some distance away, to the mole or breakwater where the ship lies, and thence are shot at once down a shoot through the ship's side into the refrigerating chamber of the ship. Thirdly, I find as facts, in regard to the carriage and discharge, that there were no other shipments on board the *Fifeshire* of "Sun Brand X" with duplicated 2, or duplicated 8, under any bills of lading other than those of which Parsons became the holder, nor were there any claims by any other consignees for the "388" or the "522," which the defendants sought to deliver to the plaintiff as part of his consignment. In the result, I have come to the conclusion, upon the question of fact, that the defendants have discharged the burden of proof, which undoubtedly lay upon them, and that the true inference from the evidence is that the "Sun Brand 388 X," and the "Sun Brand 522 X," which the defendants asked the plaintiff to take as part of his consignment, did respectively form part of the quantities set forth in the two bills of lading, and were, by the shippers' error, incorrectly included in the respective marginal specifications under "488" and "622."

It appeared that the first two figures of the number had no significance whatever for a buyer of the carcases.

The plaintiff had purchased the carcases represented by the bills of lading from the agents of the shippers, receiving from

(1) It will be observed that the first figure of the numbers mentioned in the margins of the bills of lading only imported that the lambs had been killed and frozen one day later than the day indicated by the first figure of the numbers marked upon the carcases actually shipped.

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them an invoice describing the carcases purchased by the marks and numbers by which they were described in the bills of lading; and upon the purchase the bills of lading were indorsed and handed to him by the vendors, together with a certificate of insurance which covered the carcases by the same description against all risks for two months from the date of the ship's arrival in dock, when lying at the Leadenhall Market Storage Company's premises, and other places.

The learned judge held that s. 3 of the Bills of Lading Act, 1855, did not operate to make the bills of lading conclusive as against the defendants as regards the statement of marks upon the goods shipped where those marks did not affect or denote substance, quality, or commercial value; and that, the defendants having proved that the carcases tendered by them as before mentioned were the carcases actually shipped under the bills of lading, and those carcases being marked and numbered as described in the bills of lading as regards the marks and numbers which were material as affecting or denoting substance, quality, and commercial value, the defendants were entitled to judgment.

Jan. 18, 24. *Danckwerts*, *K.C.*, and *Loehnis*, for the plaintiff. The numbers specified in the margin of the bills of lading were material, as identifying the carcases forming the plaintiff's shipment. The sale to him was made, and sub-sales would be made, with reference to these numbers, and the insurance of the shipment was effected with reference to them. The numbers might be very material in ascertaining to what consignee particular carcases forming part of the cargo belonged. If the contention of the defendants is correct, there might be a considerable delay before the carcases belonging to a consignee could be identified by a process of elimination, and therefore before delivery of them could take place. The question whether the particular carcases tendered really formed part of the shipment belonging to the consignee in such a case would involve an exhaustive inquiry into the circumstances of the shipment, and the other consignments forming part of the cargo, which might require the evidence of witnesses resident at the place of

loading. It is submitted that it was precisely to avoid all such questions that s. 3 of the Bills of Lading Act, 1855, was passed. The numbers enable the particular carcase to be traced in the books of the shippers, the Christchurch Meat Company. The power of so tracing them may be a very material thing to the consignee, for the practice is that the insurance on these carcases covers all possible risks, including that of insufficient freezing. So that it may become very material to ascertain the dates and other particulars as to the killing and freezing of the lambs. The first figure indicated the date of killing as being such a day, and the consignee was entitled to delivery of the carcases of lambs killed on that and not another day. The effect of the section is that the consignee is entitled as against the person signing the bill of lading to delivery of the goods therein represented to have been shipped. It is submitted that the goods represented to have been shipped by these bills of lading are goods numbered as in the margin. It is not sufficient that the consignee should be tendered goods of the same character, quality, and value. He is entitled to the goods as identified by the terms of the bill of lading. The contention of the defendants, if correct, would practically destroy in such cases the effect of the section, for the consignee might be involved in a long and complicated inquiry as to the identity and character of the goods.

[They cited *Bradley* v. *Dunipace* (1); *Lishman* v. *Christie & Co.* (2); *Jessel* v. *Bath* (3); *Blanchet* v. *Powell's Llantivit Collieries Co.* (4); *Smith & Co.* v. *Bedouin Steam Navigation Co.* (5)]

Carver, K.C., and *Leck*, for the defendants. The facts proved in this case lead irresistibly to the inference that the carcases numbered respectively 388 and 522 formed portions of those shipped under the respective bills of lading. The learned judge in the Court below came to the conclusion that the figures in respect of which there was a discrepancy were not material, being really only private marks for the purposes of

(1) (1861) 7 H. & N. 200; (1862) 1 H. & C. 521.
(2) (1887) 19 Q. B. D. 333.
(3) (1867) L. R. 2 Ex. 267.
(4) (1874) L. R. 9 Ex. 74.
(5) [1896] A. C. 70.

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the shippers, and having nothing to do with the substance, quality, or commercial value of the goods. All that s. 3 of the Bills of Lading Act, 1855, provides is that the person signing a bill of lading representing goods to have been shipped shall be estopped from denying that those goods were shipped. It does not provide that he shall be estopped from denying the truth of any particular which may be contained in the description given of them in the bill of lading. It cannot have been intended by the section that, if any particular, however immaterial, is by any mistake or clerical error inserted in the description of the goods in the bill of lading, the person signing the bill of lading is estopped from denying that goods answering the description in that particular were shipped. It is a fallacy to treat the bill of lading exactly on the same footing as a contract for the supply of goods answering a certain description. In the case of such a contract, it may be that the vendor must supply goods answering the particulars of the description, whether material to the value or quality of the goods or not. This is a question of carriage, and, apart from the Act, the carrier is only liable to deliver that which he has received for carriage however wrongly described. The question is how far the Bills of Lading Act, 1855, has affected his liability in that respect. It is submitted that the section was not intended to affect it to the extent suggested by the plaintiff. The terms of the section would be amply satisfied by holding that the effect of it is that the person signing the bill of lading is estopped from saying that goods to the number and of the kind specified have not been shipped.

Furthermore it is contended that the case comes within the clause in the bills of lading which provides that the ship will not be responsible for correct delivery, unless each package is distinctly, correctly, and permanently marked by the merchant before shipment with a mark and number or address. The bill of lading is made out by the shippers, and the numbers were inserted in the margin by them. It was their error in the description of the numbers which led to the mistake. For this purpose the plaintiff stands in their shoes.

[ROMER L.J. Does not this clause of the bill of lading refer

to marks and numbers upon the goods shipped themselves? The word "correctly" is collocated with the words "distinctly" and "permanently," which do not appear to be applicable to the description of marks in the bill of lading.]

It is submitted that the word "correctly" must import that the shippers are to give correctly the marks and numbers borne by the goods so that the marks and numbers on the goods may correspond with those mentioned in the bill of lading. It is impossible in the hurry of shipment to tally the mark and number on each carcase with that given in the bill of lading.

Danckwerts, K.C., in reply.

Cur. adv. vult.

Feb. 19. A. L. SMITH M.R. read the following judgment:— This is an action by an indorsee for valuable consideration of two bills of lading signed by the defendants to recover the sum of 124*l.* 19*s.* 1*d.* for short delivery thereunder in the port of London of 154 carcases of frozen lambs ex steamship *Fifeshire*: and the question is whether the plaintiff was bound to accept in fulfilment of the contract contained in these bills of lading carcases of frozen lambs which not only did not bear the marks and numbers upon the bills of lading of which he was indorsee for value, but bore marks and numbers which were different from, and not those upon, the bills of lading. It is sufficient to trace what took place in respect of one of these bills of lading, for by so doing the case will be freed of many details, and the point will thus become more conspicuous.

On March 30, 1899, the defendants signed a bill of lading, which, so far as material, is as follows: Shipped in good order by the Christchurch Meat Company, Limited, on board the steamship *Fifeshire*, now lying in Timaru, 1076 carcases, frozen lambs, being marked and numbered as in margin, to be delivered in like good order and condition (subject to exceptions not material to this case) at the port of London unto order or assigns. The marks and numbers in the margin of the bill of lading were as follows: The Sun Brand, Canterbury, N.Z., Lamb 622 X, 608 carcases, 722 X, 468 carcases, weighing 35,806 lbs. The meaning of these marks and numbers, apart

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from special meanings unknown to the plaintiff, was that 608 carcases of Sun Brand, Canterbury, New Zealand, lambs marked 622 X, and also 468 carcases of similar lambs marked 722 X—i.e., 1076 carcases in all, and so marked and numbered —had been shipped under the bill of lading upon the steamship *Fifeshire*, which carcases so marked and numbered, and not, in my judgment, carcases marked and numbered with other and different marks and numbers, were contracted to be delivered in like good order and condition, subject to exceptions, at the port of discharge. Before dealing with what these marks and numbers further indicated I will state what took place.

On June 16, 1899, the plaintiff purchased the lambs covered by this bill of lading from the agents of the shippers, the Christchurch Meat Company, and upon such purchase received an invoice from them. By this invoice the plaintiff was debited with 1076 carcases marked 622 X and 722 X, and for these carcases he paid the sum of 820*l.* 11*s.* 1*d.* Upon the purchase the bill of lading was indorsed and handed to the plaintiff, and he also then received from the vendors a certificate of insurance which covered 608 carcases marked 622 X and 468 carcases marked 722 X, for two months from the date of the arrival of the steamship *Fifeshire* in dock, when lying at the premises of the Leadenhall Market Storage Company and other places. It will thus be seen that these carcases were shipped under specific marks and numbers. They were taken on board by the ship as being carcases so marked and numbered, and were to be, in my judgment, as I have said before, delivered, subject to exceptions not material to the point in hand, under these marks and numbers, and certainly not under different marks and numbers at the port of discharge. There is no question in this case of marks and numbers being obliterated by sea perils or otherwise. These carcases were purchased by the plaintiff from the shippers under the specific marks and numbers, and, as before stated, the plaintiff held a certificate of insurance covering carcases so specifically marked and numbered and none other. Upon the plaintiff having thus become indorsee of the bill of lading and purchaser of the carcases above mentioned, application was made on his behalf for delivery, together

with others, of the 608 carcases marked 622 X and of the 468 carcases marked 722 X, when delivery of the 468 carcases marked 722 X was duly made, but delivery of the whole of the 608 carcases marked 622 X was refused upon the ground that the defendants could not deliver the whole of these 608 carcases, for, it was said, they had not all been shipped on board; but the defendants were willing to deliver to the plaintiff 507 of the 608 carcases marked 622 X, as in my judgment they were bound to do, but this was 101 carcases short of the bill of lading quantity, and in respect of this shortage of 101 carcases they subsequently tendered 101 carcases not marked 622 X but marked 522 X. These the plaintiff refused to accept in fulfilment of his contract with the defendants, and Kennedy J. has held that he could not refuse and was bound to take these 101 carcases not marked according to his bill of lading, but marked in an altogether different way, for 622 X is certainly not the same mark and number as 522 X; and the plaintiff appeals.

Before I come to s. 3 of the Bills of Lading Act, 1855, I wish to consider whether the marks and numbers 622 X, which are the marks and numbers whereby to identify the plaintiff's carcases and without which they could not be identified, were marks and numbers which were material to the plaintiff, either as regards the identity of the carcases which the plaintiff was entitled to receive under his bill of lading or as regards his dealing with the carcases after he had received them: for, if material to the plaintiff, I cannot agree with Kennedy J. that the plaintiff was bound to accept the carcases tendered in fulfilment of the contract contained in the bill of lading. If the marks and numbers were not material to the plaintiff, other considerations would arise, and in my opinion that case would not be the present case.

Now, first of all, why are marks and numbers of identification placed in the ordinary course of business upon goods and also upon a bill of lading? In my opinion in the first place to identify to the holder of the bill of lading, whoever he may be, the goods which that holder is entitled to demand and take delivery of ex ship upon its arrival. In the present case there were in the hold of the *Fifeshire* many thousands of carcases

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under different bills of lading with different marks and numbers. If a holder of a bill of lading has, for instance, a bill of lading for carcases or for other goods, say for corn in sacks, in a ship containing different shipments of carcases or corn, with no marks at all thereon, a very improbable contingency, what is he to demand ex ship upon its arrival? It seems to me he can demand nothing, and he must wait until all the other holders of bills of lading with marks and numbers thereon have been satisfied, and then take what happens to be left in the hold of the ship, and it may be thus lose the market in the meantime; and, again, if he has a bill of lading with marks and numbers on it, and no goods with like marks and numbers come up out of the hold of the ship, the same thing must happen. Again, suppose a bill of lading holder were to take ex ship goods not marked in accordance with his bill of lading, say goods marked as in this case 522 X, instead of goods marked 622 X according to his bill of lading, what would be his position, if and when the holder of the bill of lading for goods marked 522 X came and demanded his goods from the bill of lading holder, who had taken the goods marked 522 X under a bill of lading only covering goods marked 622 X? The answer is obvious. The person who had thus taken these goods would have to give them up. Surely these matters have only to be stated to shew the materiality of marks and numbers of identification in commerce and the importance necessarily attaching to them in the carrying on of daily business. In my judgment the marks of identification in this case are very material, although there may be some cases in which certain identification marks may be superfluous or for some other reason immaterial. But this remark has no place in the present case. Again, if in the present case the plaintiff could be forced to take the carcases marked 522 X, as Kennedy J. has held that he can be, what becomes of his insurance which only covered carcases marked 622 X and not carcases marked 522 X? In my opinion, if the plaintiff had had to make a claim against the insurance company, if the goods were burnt, the company, under a defence that their insurance covered carcases marked 622 X and not carcases marked 522 X, would

stand well for judgment, or at the very least there would obviously be protracted litigation. With these remarks as to the materiality of marks and numbers of identification I come to the Bills of Lading Act, 1855.

In my opinion s. 3 of this Act prevents a person who has signed the bill of lading from attempting to shew in a case such as this that of the carcases marked 622 X, 101 were not shipped, but that carcases marked 522 X were shipped in their place. In my opinion the Bills of Lading Act was passed to shut out a person who signs the bill of lading from a controversy such as this with a holder for value of a bill of lading. This section enacts that "every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board; provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by shewing that it was caused without any default on his part, and wholly by the fraud of the shipper or of the holder or some person under whom the holder claims." No question arises upon the latter part of this section. What then are the goods in this case represented by the bill of lading to have been shipped on board the steamship *Fifeshire*? In my opinion the representation is not that 608 carcases not marked or numbered at all, nor that 608 carcases marked 522 X have been shipped, but that 608 carcases marked 622 X have been shipped. That being in my opinion the representation of the bill of lading, the Bills of Lading Act applies to this case and shuts out the present suggested defence from the defendants; and I do not think that the Bills of Lading Act is confined to marks of quality and quantity, which are comparatively rare when compared with marks of identification, and which quality marks when used are usually coupled with a statement in the bill of lading "weight, contents, and value

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unknown." In my opinion s. 3 of the Bills of Lading Act applies to what is usual, if not universal, in commerce, namely, to goods as in the present case shipped under specific marks and numbers of identification, and so represented in the bill of lading. The above is my opinion independently of the special value proved in this case to be attached to the marks and numbers themselves. It was proved that "Sun Brand X" denotes the quality of the carcases; the number 6 denotes the date when the animal was killed and put into ice; the duplication of the numbers (2.2.) shews where the animal was killed and frozen; the final number 2 shews the grade. These numbers appear to me to be material, apart from identification, should disputes arise as to the freshness or otherwise of or about the quality of the carcases. Moreover, if the plaintiff is bound to take carcases marked 522 X, as Kennedy J. holds he is, instead of carcases marked 622 X, he will be bound to take carcases killed and frozen at a date different from that of the carcases marked 622 X in his bill of lading, which he has purchased. Can this be? I think not. Kennedy J. embarked upon the inquiry as to whether a carcase marked 522 X had any different value in the market for meat from a carcase marked 622 X, and as a commercial article he found that it was absolutely unaffected in its character or value; but, with submission, it is not merely a question as to whether the carcases under the different marks were of the same value in the market, but whether the marks and numbers were material or immaterial to the plaintiff. If I purchase cases of champagne identified by marks A B C, what answer is it, when I claim my goods so marked and identified, to say that the goods tendered, which are marked X Y Z, are of the same value in the market, or even of greater value than those marked A B C? For the reasons above I think that the marks of identification in this case were of materiality to the plaintiff, and that the tender was not a good tender. Kennedy J. also investigated the question whether 101 carcases marked 622 X were put on board at Timaru, and he came to the conclusion that they were not, and that the 101 carcases marked 522 X were put on board in their place; but this, in my opinion, for the reasons

above, he could not go into as a defence by a person who signed the bill of lading, and I think that the plaintiff could not be forced by the defendants in this case to take the 101 carcases not marked according to his bill of lading; and, if this case had rested here, I could not have found for the defendants. For the reasons hereafter appearing I need say nothing about the damages.

A very formidable point was next taken by Mr. Carver for the defendants, which was that, even if the tender of the 101 carcases was a bad tender, the defendants were protected by a clause in the bill of lading from being sued in the circumstances of this case for incorrect delivery of 608 carcases marked 622 X. This clause is as follows: "The ship shall not be responsible for correct delivery or loss unless each package is distinctly, correctly, and permanently marked by the merchant before shipment with a mark and number or address." What is the meaning of each package being correctly marked with the mark and number before shipment? In my judgment it can only mean correctly marked with the mark and number according to the bill of lading; for with what else can the mark and number upon the packages mentioned in this clause be correct? These marks and numbers must also be distinct and permanent. In my opinion, this is the true meaning of this clause, and it was inserted to meet a case like the present, where the goods were not correctly marked according to the bill of lading. It must not be forgotten that the bill of lading is drawn by the shippers, who ought to make the marks and numbers in the bill of lading and on the goods correct with each other. Kennedy J. has found, and I do not differ from his finding upon this issue, though he has not applied the clause, for it was not necessary for him to do so in the view he took of this case, that the 101 carcases marked 522 X were not correctly marked, and should have been marked 622 X, in which case, and in which alone, in my opinion, they would have been correctly marked within the meaning of the clause. As, therefore, these 101 carcases were not correctly marked, this clause comes into play and exempts the defendants from the present claim of the

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plaintiff. For this last reason I think this appeal should be dismissed.

COLLINS L.J. read the following judgment:—This case raises a point of some difficulty upon the meaning and effect of s. 3 of the Bills of Lading Act, 1855. The case comes before us on appeal from Kennedy J., in whose judgment the facts are fully set out. The plaintiff is the indorsee for value of two bills of lading signed by the defendants; and he sues for damages for non-delivery of certain carcases, part of a consignment of frozen lambs' carcases embraced in the said bills of lading. The same point arises on both the bills of lading, and it is not necessary to refer to more than one of them. This acknowledged the shipment of "1076 carcases frozen lamb," "being marked and numbered as in the margin." The marks in the margin are "Sun Brand, Canterbury, N.Z., Lamb, 622 X 608 carcases, 722 X 468 carcases, weighing 35,806 lbs." The learned judge has found as a fact, and I think the evidence warrants his conclusion, that there were included among the 608 carcases described in the margin as having the mark 622 X, 101 carcases marked 522 X, which by a mistake of the shippers were misdescribed in the margin of the bill of lading as marked 622 X instead of 522 X, but were in fact shipped under, and intended to be comprised in, the bill of lading. Those marked 522 X were, as he finds, of precisely the same character and value as a commercial article as those marked 622 X, so that a contract for sale of Sun Brand lambs, second quality, of the Christchurch Company's freezing, might have been satisfied equally well out of either mark or out of both indiscriminately. In fact, the first two marginal figures have no significance whatever to the buyer, and convey to him no representation as to the character of the meat. The final figure does indicate the grade. In the words of Kennedy J.: "The meat as a commercial article is absolutely unaffected in its character or value, whether it is marked 522 or 622." The defendants tendered these carcases marked 522 X as being part of those shipped under the plaintiff's bill of lading, but, the price of frozen lamb having fallen since his

purchase, the plaintiff refused to accept them, and brought this action for damages for non-delivery. His contention is that under s. 3 of the Bills of Lading Act, 1855, the defendants are estopped from denying that goods marked as described in the margin of the bill of lading were shipped, and that, as those they tendered did not bear identically the same marks, there has been a failure to deliver, which entitles the plaintiff to the damages fixed by the bill of lading in case of loss—namely, the invoice price of the goods. The defendants, on the other hand, contend that the goods tendered were in fact the goods shipped under and comprised in the bill of lading, although some of them were by mistake described as bearing a mark which they did not bear; that the existence and identity of the goods are unaltered in fact, though the identification may be more difficult by reason of the misdescription. And this was the view taken by Kennedy J. He was of opinion that the identity of the goods tendered with those shipped under the bill of lading was proved, and my judgment is based on that finding. If such identity could not be established, very different considerations would arise.

As the plaintiff's case is rested wholly on the estoppel of the Bills of Lading Act, it is desirable to see what was the mischief to which that Act was addressed, in order to determine whether s. 3 will bear the construction placed on it by the plaintiff. The preamble, so far as it relates to this matter, is as follows: "Whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a bonâ fide holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid, Be it therefore enacted," &c. The mischief, therefore, which it was thought desirable to remedy, only arose where the goods in respect of which the bill of lading purported to be signed had not been put on board, and the master or person signing relied on that fact as an excuse for non-delivery. Here it is a fact that all the goods in respect of which the bill of lading was intended to be signed were put on board, though certain of the

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marks on some of them were miscopied in the bill of lading, and the person signing is not setting up that they have not been laden, but, on the contrary, is insisting that they have been laden, and is claiming to deliver them. Sect. 3 is as follows: "Every bill of lading in the hands of a consignee or indorsee for valuable consideration, *representing goods to have been shipped* on board a vessel, shall be conclusive evidence of *such shipment* as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board: provided that the master or other person so signing may exonerate himself *in respect of such misrepresentation* by shewing that it was caused without any default on his part and wholly by the fraud of the shipper or of the holder or some person under whom the holder claims." The section, therefore, addresses itself to the mischief named in the preamble. It deals with persons who have acted on a misrepresentation in a bill of lading that goods have been shipped when they have not, and estops the person signing from denying the shipment. It is the identity of the goods shipped with those represented as shipped which is the pith of the matter; that is the subject of the misrepresentation referred to, and nothing which would not be material to such identity need be embraced in the estoppel. It is obvious that, where marks have no market meaning and indicate nothing whatever to a buyer as to the nature, quality, or quantity of the goods which he is buying, it is absolutely immaterial to him whether the goods bear one mark or another. These considerations throw a light on the interpretation of the section. It is only as to "such shipment" that the bill of lading is said to be conclusive, and such shipment refers back to the goods which the bill of lading represents to have been put on board. Now, the goods which the bill of lading represents as shipped continue to be the same goods, whichever out of any number of merely arbitrary marks are put on them, and will remain the same whether the marks were on them before shipment or are rubbed off or changed

after shipment. In other words, they go to the identification only, and not the identity. The goods represented by the bill of lading to have been shipped have been shipped, and a mistaken statement as to marks of this class merely makes identification more difficult; it does not affect the existence or identity of the goods. It seems to me, therefore, that, both on the strict wording of the section, and having regard to the mischief to which it was addressed, the plaintiff has failed to bring his case within the estoppel which it creates. It is not the fact, and it would not be true to say that the 1076 carcases which the bill of lading represented to have been shipped were not shipped, because the bill of lading did not correctly describe the mark on some of their number. In my opinion, as I have already said, their identity was unaffected, and the property in them, marked as they were, passed to the plaintiff on the transfer of the bill of lading. The defendants are estopped from denying "such shipment," but nothing more, and the shipment is none the less the shipment represented by the bill of lading, because some of the marks were misdescribed. The defendants are not here questioning the bill of lading on the ground "of the goods not having been laden," and are not driven to asserting anything which they are estopped from asserting. I agree with Kennedy J. that to adopt the construction contended for by the appellant would be to strain the fair meaning of the section, and extend it beyond the mischief it was intended to meet. Moreover, if mere identification marks are within the estoppel, any discrepancy between the mark on the goods and the mark in the margin would equally destroy the identity. Every difference would be equally material, whether the result of accident or clerical error. To hold this would impose an enormous and, indeed, having regard to the practice of tallying, an impossible task on the shipowners. Marks which convey a meaning as to the character of the goods stand on a totally different footing. These, it seems to me, would be embraced in the estoppel, because the characteristics which they indicate are essential to the identity of the goods, and an article so marked is a different article in the market from one not so marked. They are material factors in

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the identity as distinguished from the identification of the goods sold, and therefore a discrepancy between the goods described and the goods shipped would mean a difference of identity, and the signer of the bill of lading would therefore fail to prove that the goods which the bill of lading represented to have been shipped had been shipped, and, being estopped from denying that the goods shipped were "such" as the bill of lading represented them to be, he could not make a good delivery. On the other hand, suppose a mere arbitrary mark correctly described in the bill of lading had got rubbed off in transit, and that the package was, nevertheless, otherwise sufficiently identified, would not the indorsee of the bill of lading be bound to accept it? Would not the property in it have passed to him, so that he could have maintained trover for it, if the shipowner had on demand refused to deliver it; and, though he might have his action for any delay in delivery through difficulty of identification, could he sue the carrier for non-delivery on the footing that it had been lost, though the carrier was pressing it on his acceptance? If not, it must be because the loss of the mark has not destroyed the identity. But the appellant's argument involves a right to sue for non-delivery in such a case, since the ground of rejection and of action would be precisely the same in both cases, namely, the want of correspondence in marks between the thing shipped and the thing tendered. Suppose the master had signed the bill of lading, and the price of the goods had gone up, and an action had been brought against the shipowner claiming delivery of the carcases in question, could he have defended himself on the ground that the master could not make him responsible for goods that had not been put on board, and that the undelivered balance of the bill of lading quantity had not been put on board? (See *Grant* v. *Norway*. (1)) Or, on proof of the actual facts, would he not have been held liable on the ground that the goods were put on board, and that the master's mistake in allowing a wrong mark of this class to get into the margin (not a quality mark, as in *Cox* v. *Bruce* (2)), was a mistake within the scope of his authority, and that all the 1076

(1) (1851) 10 C. B. 665. (2) (1886) 18 Q. B. D. 147.

carcases were in fact shipped? Or, to take a still simpler case, if this action had been brought before the Bills of Lading Act, and the same facts had been proved, would they have supported a defence that the goods had never been put on board, and that the defendant, therefore, never became liable to deliver them? I think the defendant would have been forced to admit that he had in fact received on board the goods intended to be described in the bill of lading. But, if this be so, this case is clearly not within the mischief at which the Bills of Lading Act was pointed. Indeed, it was not suggested in argument that the shippers could have maintained this action, and the plaintiff takes only the shippers' rights under the bill of lading by the transfer, except so far as the statutory estoppel alters them. That estoppel is, in my opinion, limited to the identity of the goods shipped.

An element of confusion, as it seems to me, has been introduced into this case based on the meaning which the first figure of the marks in question, the only one which did not correspond with the bill of lading, had for the manufacturers, indicating, as it did, to them the day of the week on which the carcase was put into the freezing process. But, as it is found as a fact that these figures conveyed nothing whatever to dealers in these goods, and, further, that the first figure indicated in fact nothing which had any bearing on the quality of the goods, but was merely a private mark helping the manufacturers to trace them through their books, it seems to me that any considerations based on them can have no place in the discussion. The same remark applies to the insurance. The goods were equally covered under the floating policy, whether they were 522 or 622: see *Stephens* v. *Australasian Insurance Co.* (1) The result is that the right of action, if any, for loss or inconvenience caused by the mistake is untouched, but the plaintiff cannot maintain an action for non-delivery based on the estoppel.

The decided cases throw little light on the matter. They certainly do not favour the appellant's contention. *Bradley* v. *Dunipace* (2) merely decided that, where two sets of bags of

(1) (1872) L. R. 8 C. P. 18. (2) 7 H. & N. 200; 1 H. & C. 521.

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rye meal of two different sizes but with the same mark had been shipped promiscuously, but the master had signed two bills of lading for them, one of which was for 467 bags, with a statement of weight added which, if calculated, would have worked out to approximately 12 stone a bag, the master was not excused from delivering the right bags to the holder of the 467 bill of lading by the clause "not responsible for weight." It was his duty to deliver the right bags, and the statement of weight might have helped him to identify them. This does not seem to touch the point in discussion. *Cox* v. *Bruce* (1) emphasizes the distinction between quality marks and other marks. *Blanchet* v. *Powell's Llantivit Collieries Co.* (2) decided that a master who had signed a bill of lading for goods described as of a certain weight was not estopped in an action brought by him against the consignee for lump freight from asserting that the amount stated was a mistake and that a less weight had been shipped, though he might have been, had the action been against him for non-delivery. The defendant by paying money into court had admitted liability for some freight, whereas the defence, if good, would have gone to the whole. The issue of amount shipped was therefore immaterial. The decision and the dicta do not touch the question of marks, going not to quantity or quality, but to identification only. The other cases cited come no nearer to the point.

It remains to consider the effect of the clause in the bill of lading—"The ship will not be responsible for correct delivery unless each package is distinctly, correctly, and permanently marked with a mark and number or address." The bill of lading is on the shippers' (the Christchurch Company, Limited) own form. One side of it has a printed statement of their address and different factories and an enumeration of various brands used by them. The practice with respect to them, as proved in evidence, is that a bill of lading is filled in at their factory with the marks and numbers supplied to them by their own servants, whose business it is to tally the goods into cold vans for carriage to the ship's side. They are thence shot rapidly—at the rate of about 1000 an hour—into the cold

(1) 18 Q. B. D. 147. (2) L. R. 9 Ex. 74.

chamber in the ship, and no attempt is made by the ship to do more than tally the number of carcases received. The marks and numbers filled in by the shippers in the margin are accepted by the person who signs the bill of lading without verification. Timaru, the port of loading, is an open roadstead and dangerous, and it is important that the loading should be done with the utmost despatch. What, then, is meant by "correctly marked" in the clause? The marks referred to seem in their context to be clearly identification marks, which would get copied as such into the margin of the bill of lading. If so, it is difficult to see what standard of correctness could be applied to such a mark which did not include conformity to the mark in the margin of the bill of lading as tendered by the shippers. If the two coincide, it is difficult to see in what other respect the "correctness" of the mark could be material. At all events, the clause is clearly framed on the footing that but for the clause the reciprocal rights to give and take delivery would be unimpaired by the incorrectness of mere identification marks, the shipowner being left at his peril to deliver to the person entitled, the latter retaining his right to complain of "incorrect delivery" brought about by the difficulty of identification, but not excused from accepting, if the identity of the goods were established. I regard it, not so much as a separate ground of defence in itself, as confirmatory of the main position above indicated that in the contract of the bill of lading mere identification marks are not regarded as affecting the central obligation to give and take delivery of the goods shipped, though incorrectness may furnish ground for a cross-claim, if the consignee is thereby damnified.

As to the point that, if the estoppel is not extended to the identification marks, it will lead to great difficulty in practice, I think the difficulty is less formidable than it appears at first sight. It must be remembered that the difficulty, such as it is, exists in all cases where there is no estoppel. At the time when the Bills of Lading Act was passed, bills of lading were much more rarely signed by persons other than the master than is the case now, and whenever the action was brought against the shipowner who had not signed, which would be

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the usual case, difficulty of identification would not have excused delivery or acceptance, if identity were in fact established. The Legislature does not seem to have addressed itself to this matter at all, but to have left it to the ordinary law. I am of opinion, therefore, that the appeal should be dismissed.

ROMER L.J. read the following judgment:—On the evidence it has been found by Kennedy J. that the carcases tendered by the defendants were part of those shipped under, and intended to be described in, the plaintiff's bill of lading. I am not prepared to differ from that finding. The plaintiff, however, contends that the defendants are by s. 3 of the Bills of Lading Act, 1855, precluded from going into evidence in order to establish the identity of the carcases tendered with those described in the bill of lading, by reason of the discrepancy between the marks on those carcases and the marks mentioned in the bill of lading. This contention raises a question of general importance as to the meaning and effect of the section, which speaks of a bill of lading "representing goods to have been shipped." Is every reference in a bill of lading to the marks on the goods of necessity part of the description of the goods within the meaning of the section? I think not. When it is remembered what the state of the law was at the time when the Act was passed, and what was the mischief intended to be remedied by the Act, it appears to me pushing the estoppel created by the section too far against the person signing the bill of lading to hold that he can in no case be permitted to go into evidence to prove a mistake in the bill of lading in reference to some of the marks on the goods. Suppose, by way of example, a bill of lading was dealing with five parcels of goods of the same size, quality, and value, and, after describing these goods accurately, it proceeded to state that the parcels were numbered consecutively 1 to 5. Could a purchaser refuse to accept delivery of one or two of the parcels, and hold the signer of the bill of lading estopped under the section, because it turned out that the two out of the five parcels which should have been respectively marked 3 and 4 were both marked 4? It appears to me that he could not, and that to hold the

contrary would be to put a construction on the Act, and give an effect to its wording, which was never contemplated by the Legislature, and which the contents of the Act do not justify. In short, for the purposes of the Act a description in a bill of lading of marks on the goods is not of necessity part of the description of the goods themselves. Of course difficult questions may arise on particular bills of lading, whether certain references to marks do or do not form part of the description of the goods within the meaning of s. 3. Those questions will fall to be determined according to the circumstances of the particular cases in which they arise. But, speaking generally, when the section refers to the bill of lading as "representing goods to have been shipped" it is, in my opinion, only contemplating those statements which may be said to describe the goods in the ordinary mercantile sense—that is to say, statements which would substantially affect a purchaser relying on the bill of lading as to the quantity, quality, or value of the goods he was buying. Marks on the goods which, so far as the purchaser is concerned, have no meaning, and could only be referred to in the bill of lading in order to assist in the more sure or speedy identification or delivery of the goods, do not, in my opinion, form part of the description of the goods within the meaning of s. 3, so as to bind the signer of the bill of lading by way of estoppel. If a bill of lading makes a mistake in describing some marks like those last mentioned, and thereby delivery of the goods is delayed or not effected, the purchaser will have all the remedies for any damage caused by the delay or non-delivery which he would have had, if the Act had not been passed. In this point of view, no doubt, marks assisting identification are material to a purchaser. But I do not think he is entitled, merely because a mistake in the bill of lading as to the identification marks may cause trouble in delivery, to say that s. 3 applies, and that the signer of the bill of lading is bound to admit that the goods exactly as mentioned in the bill of lading were shipped, and yet cannot be delivered.

Applying the above considerations to the case now before us, I come to the conclusion that the appellant fails. The differences in marking between the goods he refuses to take and

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Romer L.J.

the goods mentioned in the bill of lading are differences in respect of matters not relating to the quantity, quality, or value of the goods he bought on the faith of the bill of lading, and which in nowise influenced or affected him in his character of a person considering whether he should buy the goods referred to in the bill of lading. It is clear on the evidence that, so far as he is concerned, the differences in marking are wholly unsubstantial so far as they relate to the goods in themselves. All that can be said on his behalf is that, owing to the marks not being correctly described in the bill of lading as compared with the marks on the goods themselves, some delay in delivery would probably ensue, and in fact did ensue. But, as already pointed out, this will not justify him in contending that the defendants are estopped under s. 3, whatever other rights it may give him. As to the insurance, I need not add anything to what has been said by Collins L.J. For these reasons I think the appeal must be dismissed, and I have not to decide the further point that was raised upon the clause in the bill of lading which has been referred to by the Master of the Rolls and Collins L.J. But, had I been obliged to take the view that the signer of the bill of lading was estopped as contended for by the appellant, I should have felt some difficulty in holding that a clause which was directed to "correct delivery" in case of packages not being "distinctly, correctly, and permanently marked by the merchant before shipment" freed the signer of the bill of lading from liability in a case where, ex hypothesi, he would be obliged to admit that goods of the appellant were shipped and are not delivered, and were not lost, injured, or altered in any way during the voyage.

Appeal dismissed.

Solicitor for plaintiff: *Charles Butcher.*
Solicitors for defendants: *William A. Crump & Sons.*

E. L.

THE KING *v.* BISHOP OF SALISBURY.

1901
Feb. 8.

Ecclesiastical Law—Churchwarden—Election of Parishioners' Churchwarden—Right of Incumbent to Vote at—Canon 89—*Sturges Bourne's Act* (58 *Geo.* 3, *c.* 69), *s.* 3.

An incumbent of a parish, who, upon the failure of himself and the parishioners to agree upon the choice of churchwardens, exercises his right of appointing one churchwarden, is not entitled either by the common law or under s. 3 of Sturges Bourne's Act to vote in his capacity as a ratepayer at the election of the second churchwarden.

Query, whether the minister is entitled as such to preside at the election of the parishioners' churchwarden, and in the event of the votes being equal to give a casting vote?

MANDAMUS to the Bishop of Salisbury to admit to the office of churchwarden.

At the annual vestry meeting held on April 23, 1900, for the election of churchwardens for the parish of Winterborne Came, in the county of Dorset and in the diocese of Salisbury, the rector appointed Mr. Cornish Browne to act as rector's churchwarden. For the office of parishioners' churchwarden two candidates were proposed—Mr. Vine and Mr. Passmore. Upon a poll being taken, twenty-nine votes were given for each candidate; but the votes given for Mr. Vine included six votes which the rector claimed to give as a ratepayer of the parish under the provisions of s. 3 of Sturges Bourne's Act. (1) The

(1) By Sturges Bourne's Act, s. 2, "In case the rector or vicar or perpetual curate shall not be present the persons so assembled" (in pursuance of a notice of vestry meeting) "shall forthwith nominate and appoint by plurality of votes . . . . one of the inhabitants of such parish to be the chairman of and preside in every such vestry; and in all cases of equality of votes upon any question arising therein the chairman shall (in addition to such vote or votes as he may by virtue of this Act be entitled to give in right of his assessment) have the casting vote."

Sect. 3: "In all such vestries every inhabitant present who shall by the last rate which shall have been made for the relief of the poor have been assessed" shall be entitled to one vote if he was assessed on a value of less than 50*l.*, and if he was assessed upon a value of 50*l.* or upwards shall be entitled to one vote for every 25*l.* of assessment."

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votes being equal, the rector, who was chairman of the meeting, gave a casting vote for Mr. Vine, and declared him duly elected. The year 1900 being the year of the triennial visitation of the Bishop of Salisbury, Mr. Vine applied to the bishop as the ordinary to admit him to the office of churchwarden. The bishop refused to do so on the ground that the rector, having appointed one churchwarden, had exhausted his power of voting, and had no right to vote at the election of the parishioners' churchwarden.

Mr. Vine having obtained a rule nisi for a mandamus to the bishop to admit him,

Dibdin, K.C., and *Franey*, shewed cause. Canon 89 of the Canons of 1603 (1) is declaratory of and correctly expresses the common law as to the election of churchwardens: see *Reg.* v. *Allen.* (2) And the language of the canon is plain. If the minister and parishioners agree, the two churchwardens are to be chosen by them jointly; if they do not agree the minister is to choose one, and the rest of the parishioners the other. The term "parishioners" is there used in a sense excluding the minister. The act of choosing the two churchwardens is one act, whether done by the two bodies jointly, or in part by one and in part by the other. The minister, having chosen one warden, cannot claim to join in the election of the other as a separate act of election. It has always been the practice to treat the minister as debarred from voting in the election of the parishioners' warden. In *Stoughton* v. *Reynolds* (3) Lord Hardwicke C.J. said: "As to the vicar, he seems to have no share in the election of the second churchwarden, nor to have any right to preside." In the later case of *Wilson* v. *McMath* (4) the latter proposition was held to be wrong; but Sir John Nicholl, in discussing Lord Hardwicke's dictum, affirmed

(1) Canon 89 of the Canons of 1603: "All churchwardens or questmen in every parish shall be chosen by the joint consent of the minister and the parishioners, if it may be; but if they cannot agree upon such a choice, then the minister shall choose one, and the parishioners another; and without such a joint or several choice none shall take upon them to be churchwardens."

(2) (1872) L. R. 8 Q. B. 69.

(3) (1736) 2 Str. 1045.

(4) (1819) 3 Phill. 67.

the former proposition, saying: "To be sure, if there was any case in which he" (the incumbent) "ought to have retired from the chair it was at the election of a second churchwarden with which he had nothing at all to do." There is one authority against the bishop's contention. In *Reg.* v. *D'Oyly* (1), where the question was as to the rector's right to preside at the election of the parishioners' warden and to adjourn the meeting, Lord Denman C.J. said: "It is clear that, as a parishioner, he" (the rector) "might give a vote deciding the nomination." But that was only a dictum; it was unnecessary to the decision, and the point was not argued by counsel.

It will be contended by the other side that even if by the common law the minister had no right to vote for the second warden, he has such a right now in his capacity as a ratepayer by virtue of s. 3 of Sturges Bourne's Act, which says that at every vestry meeting every inhabitant present who is rated to the poor shall be intitled to vote. But that section was not intended to alter the law relating to the election of churchwardens. The Act was intended to regulate the holding of vestries for the purposes of parochial matters generally. The fallacy of the other side's contention lies in confusing the "parishioners" in the canon with the "vestry" in the section. The electors of the second warden, although the election takes place at a vestry meeting, are not the vestry but the parishioners—that is to say, the vestry minus the parson. It may be that the Act applies to the election of the parishioners' warden to the extent of introducing the cumulative system of voting given by s. 3, and also of giving a casting vote to the chairman even though he may happen to be the minister; but it does not give the minister an original vote as a ratepayer. It would be just as reasonable to say that since the Act the minister's share in the choice of churchwardens should be conducted by the whole vestry as to say that the parishioners' share should be so. When there is a seeming conflict between the common law and the provisions of a statute the Court ought carefully to examine whether the two may not be reconciled, and full effect be given to both: see per Coleridge J., *Reg.* v. *Scott.* (2) "It is a

(1) (1840) 12 A. & E. 139. (2) (1856) 25 L. J. (M.C.) 128, at p. 133.

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sound rule to construe a statute in conformity with the common law rather than against it, except where or so far as the statute is plainly intended to alter the course of the common law": per Byles J., *Reg.* v. *Morris.* (1)

Edwardes Jones, in support of the rule. The canon does not mean what it is contended on the other side that it means. The common law rule is that laid down in *Reg.* v. *D'Oyly.* (2) The opinion there expressed is more than a dictum. Lord Denman was delivering the considered judgment of the full Court of Queen's Bench. With regard to *Stoughton* v. *Reynolds* (3), the dictum in Strange's Report does not occur in the report in Fortescue, p. 168, nor in that in Cases temp. Hardwicke, p. 274. On the contrary, Lee J. in the last-mentioned report expressly says that the parson has a right to vote in respect of his freehold. But even if the common law was as the bishop contends, it has been altered by Sturges Bourne's Act. The language of s. 3 is unqualified—"every inhabitant present" at the vestry who is assessed to the poor-rate is entitled to vote. In *Ranson* v. *Campkin* (4) it was held that the effect of the section was to give the vicar and occupiers of church lands in a parish the right to vote on a question of church rate, although they were not liable to pay church rates, Sir H. Jenner Fust laying stress on the wide language used: "These words of the statute are as extensive as can be conceived; 'in all such vestries,' namely, such as are assembled in accordance with the provisions contained in the previous sections of the Act, '*every* inhabitant present' who shall have been assessed to the previous poor's rate shall be entitled to vote." The parson, apart from the freehold which he has in his ecclesiastical character, may be a ratepayer in respect of land which he occupies in his private capacity. Surely the section would give him a right to vote in the latter character. But if so, it must equally give him a right to vote in respect of the occupation of his ecclesiastical freehold.

WILLS J. In this case I have come to the conclusion that the decision of the bishop was right, and that the rule for a

(1) (1867) L. R. 1 C. C. 90, at p. 95.
(2) 12 A. & E. 139.
(3) 2 Str. 1045.
(4) (1851) 2 Rob. 370.

mandamus must be discharged. In the first place, there is to my mind no doubt as to what the common law applicable to the subject was. I have always understood that the common law was accurately expressed in the 89th canon. That it was so, we have an authoritative statement by the Court of Queen's Bench in *Reg.* v. *Allen*. (1) Then what does the canon say? It seems to me that its language is as clear as anything can possibly be. It says that if the minister and parishioners cannot agree upon the choice of churchwardens, "then the minister shall choose one and the parishioners the other." It is obvious that the word "parishioners" is there used in contradistinction to and as excluding the minister. And that is the sense in which the term is used in common parlance, as when a minister speaks of "my parishioners." The meaning of the canon is that when once the minister has exercised his right of choosing one churchwarden he is under a legal incapacity to join in the election of the second.

Then that being the state of the common law, it remains to be considered whether it has been affected by statute. I cannot bring myself to believe that Sturges Bourne's Act was really intended to bring about so important an alteration in the manner of electing churchwardens as has been contended for. And where an affirmative statute is open to two constructions, that construction ought to be preferred which is consonant with the common law. It is contended for the prosecutor that, because s. 3 of Sturges Bourne's Act says that every inhabitant present in a vestry who is rated to the relief of the poor shall be entitled to vote, the incumbent if he is rated is entitled to vote at a vestry meeting summoned for the election of a churchwarden. I think that the exceedingly general language of that section was intended to apply to the mode of conducting the ordinary business of vestries, in which the incumbent attends as a member of the vestry and votes as such, and that it was not intended to interfere with the personal incapacity which the incumbent who has already chosen one churchwarden is under to vote at the election of the other. It is true that the election of the second

(1) L. R. 8 Q. B. 69.

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churchwarden is conducted in vestry, but it is not an election by the vestry, but by the vestry less one person, namely, the incumbent.

CHANNELL J. I am also of opinion that this rule should be discharged. It seems to be clear from the language of the canon that in cases to which it applies—that is to say, where there is no special custom in the parish—in default of agreement between the minister and the parishioners as to the choice of churchwardens, one churchwarden is to be chosen by the minister and the other by the parishioners, exclusive of the minister. That I should have thought abundantly clear without any authority. But we have the authority of Sir John Nicholl in *Wilson* v. *McMath* (1), who puts the matter beyond doubt. After discussing the various reports of the case of *Stoughton* v. *Reynolds* (2), and the dictum of Lord Hardwicke, which is differently reported in the different reports, as to the right of the minister to preside at the meeting held for the election of a churchwarden, he goes on to say: "And, to be sure, if there was any case in which he ought to have retired from the chair, it was at the election of a second churchwarden, with which he had nothing at all to do." Therefore, as long ago as 1819, this interpretation was put upon the canon which is the expression of the common law, and there is no authority whatever to the contrary except a dictum of Lord Denman in *Reg.* v. *D'Oyly* (3), which was purely obiter, the question before the Court being whether the minister was the proper person to preside at the meeting and to decide the question of adjournment. Such a dictum is entitled to little weight as against the clear words of the canon and the interpretation of it by Sir John Nicholl.

Then that being the state of the law before Sturges Bourne's Act, has that Act altered the law? Mr. Edwardes Jones does not go the length of saying that it has repealed the common law upon the subject altogether, so as to deprive the minister of his right of nominating one churchwarden, but he contends

(1) 3 Phill. 67. (2) 2 Str. 1045.
(3) 12 A. & E. 139.

that it has given him the additional right of voting as a ratepayer at the election of the second. I do not think that that is the effect of the statute. The common law relating to the election of churchwardens is a special law relating to a special and particular subject-matter. Sturges Bourne's Act is a general Act relating to the conduct of business at vestry meetings generally. It is a familiar doctrine that when you have two Acts of Parliament, one special and the other general, the latter does not repeal the former unless there is clear evidence of an intention to do so. And the same principle must apply to a repeal of the common law. A general Act must not be read as repealing the common law relating to a special and particular matter unless there is something in the general Act to indicate an intention to deal with that special and particular matter. There is no indication of any such intention in the present case, and therefore I am of opinion that Sturges Bourne's Act leaves the common law mode of electing churchwardens untouched—that is to say, that where the minister and parishioners do not agree upon a choice, the minister is to elect one churchwarden, and the rest of the parishioners, excluding the minister, are to elect the other.

The only question upon which I entertain any doubt in connection with this matter—and it is one which we are not now called upon to decide—is whether the election of the parishioners' churchwarden is an election which comes within Sturges Bourne's Act at all. But on the whole I am inclined to the view that it is, and that the election should be in accordance with the machinery and procedure of that Act; though there is one person, the minister, who is disqualified from voting as a ratepayer upon that particular question, but the votes of the others would be taken under the machinery of s. 3. The result would be that the minister, though disentitled to vote as a ratepayer, would be entitled as minister to preside at the meeting, and in his capacity as chairman to give a casting vote in the event of the votes being equal. On this point I do not wish to be taken as expressing a definite opinion one way or the other, but the present impression of my mind is as I have stated. But I am clear that the original

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six votes given by the rector for Mr. Vine were bad, and that the rule must consequently be discharged.

Rule discharged.

Solicitors for prosecutor: *Jenkins, Baker & Co.*

Solicitors for bishop: *Robins, Hay, Waters & Hay, agents for E. Archdall Ffooks, Registrar of the Archdeaconry of Dorset.*

J. F. C.

1901
Jan. 28, 29; *Feb.* 16.

HULL, APPELLANT; THE LONDON COUNTY COUNCIL, RESPONDENTS.

London County—Buildings—Projection beyond General Line of Buildings in Street—Advertisement Sign attached to Building—Offences—Limitation of Time for Commencement of Proceedings—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 73, *sub-s.* 8—*Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 11.

By s. 73, sub-s. 8, of the London Building Act, 1894, "No projection from any building" (except certain specified projections) "shall extend beyond the general line of buildings in any street" without the consent of the London County Council. By s. 11 of the Summary Jurisdiction Act, 1848, where no time is specially limited by Act of Parliament for making a complaint or laying an information, the complaint shall be made or the information laid within six months from the time when the matter of such complaint or information arose.

The appellant was convicted on an information charging him with the offence specified in s. 73, sub-s. 8, of the London Building Act, 1894, the projection complained of being a wooden case attached to the external wall of a building by iron brackets, and used as an advertising sign. It had been put up more than six months before the information was laid:—

Held, that the conviction was wrong because, first, the sign was not a projection within the meaning of s. 73, sub-s. 8, which applies only to projections forming part of the building from which they project, and, secondly, the prosecution was barred by s. 11 of the Summary Jurisdiction Act, 1848.

CASE stated, under the Summary Jurisdiction Acts, by a metropolitan police magistrate sitting at the Clerkenwell Police Court.

On May 17, 1900, an information was preferred before the magistrate on behalf of the London County Council charging that the appellant on or about December 19, 1899, at No. 209,

Seven Sisters Road, Islington, within the district of the Clerkenwell Police Court, did unlawfully extend a projection beyond the general line of buildings of Seven Sisters Road and Campbell Road without the permission of the London County Council, contrary to s. 73, sub-s. 8, of the London Building Act, 1894. (1)

Upon the hearing of the information the following facts were proved before the magistrate:—

1. The appellant is, and was at the time of the said information, the tenant of a shop and premises situate at the corner of Seven Sisters Road and Campbell Road known as No. 209, Seven Sisters Road.

2. By an agreement in writing, made on June 9, 1899, between the appellant of the one part and S. H. Benson, an advertiser's agent in Fleet Street, of the other part, the appellant let to Benson a position covering the first-floor window at the corner of the premises No. 209, Seven Sisters Road for the purpose of erecting thereon an electric or other advertising sign. The tenancy was to commence as soon as the sign was lighted, and in any case not later than June 24, 1899, and was to be for the term of one year, with the option of renewal for a period of not less than two years, at a yearly rental of 20*l*.

3. That agreement was entered into by Benson on behalf of his clients, Frederick King & Co., Limited, the proprietors of an article known as "Edwards' Desiccated Soup," which was the subject of the advertisement referred to in the next paragraph.

4. Between the 13th and the 20th of June, 1899, the Electric Sign and General Advertising Company, Limited, whose office is in Fleet Street, London, put up for Frederick King & Co., Limited, an electric advertisement sign over the front of the

(1) The London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 73, sub-s. 8: "Except in so far as is permitted by this section in the case of shop fronts and projecting windows, and with the exception of water-pipes and their appurtenances, copings, string courses, cornices, facias, window dressings, and other like architectural decorations, no projection from any building shall extend beyond the general line of buildings in any street except with the permission of the council after consulting the local authority."

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appellant's premises in the position mentioned in the agreement. The sign was commenced to be put up on the 13th of June, 1899, and was completely affixed to the external wall of the said premises on the 20th of June, 1899.

5. The sign consisted of a wooden case with a glass front, the case being attached to the external wall of the premises by iron brackets, a space of six inches intervening between the back of the case and the wall, and a portion of the apparatus working the sign being within the room on the first floor. The sign measures ten feet six inches in height by seven feet in breadth, and when lighted by electricity shews an advertisement of Edwards' Desiccated Soup.

6. The sign was placed immediately over the cornice of the shop front, and, including the iron brackets, projected only sixteen inches beyond the external wall of the premises. The sign did not project over the highway.

7. In the month of March, 1900, a surveyor from the London County Council called and saw the appellant with reference to the sign, and on or about March 16, 1900, the London County Council served a notice of that date on the appellant requiring him to comply with the law.

8. In the information and the summons issued upon it, the offence was charged as having been committed by the appellant on or about December 19, 1899, the date on which it was brought to the attention of the council—that is to say, within six calendar months of the date of the information; whereas the sign was completely affixed as before mentioned by June 20, 1899—that is to say, more than six calendar months before the date of the information.

9. On May 23, 1900, notice of an appointment to define the general line of buildings of the said premises was served by the London County Council on the appellant, and on May 29, 1900, the appointment took place in accordance with the said notice. The superintending architect of metropolitan buildings, by his certificate dated June 2, 1900, defined the general line of buildings of the appellant's premises as being the main fronts of the building on the eastern side of Campbell Road and on the northern side of Seven Sisters Road respectively, and the

position of the sign with reference to the general line of buildings as so defined is shewn on the plan annexed to his certificate.

The magistrate found as a fact that the sign did project beyond the general line of buildings in the two streets, as defined by the superintending architect. He held that the offence was a continuing offence, and convicted the appellant, and ordered him to pay a fine of 40*s.* and 2*s.* costs.

The questions for the opinion of the Court were :—

1. Whether the prosecution of the alleged offence was barred under s. 11 of the Summary Jurisdiction Act, 1848 (1), by lapse of time.

2. Whether the sign constituted a projection within the meaning of s. 73, sub-s. 8, of the London Building Act, 1894.

3. Whether, if the prosecution was not barred and the sign was a projection within the meaning of the Act, the appellant could, having regard to the agreement stated in the case, under the circumstances be properly convicted of the alleged offence.

Macmorran, Q.C. (*Kenrick* with him), for the appellant. First, the thing which has been put up is not a projection from a building within the meaning of s. 73, sub-s. 8, of the London Building Act, 1894. The words "projection from any building" mean something which projects as part of the building itself. Sect. 73 is in Part VI. of the Act, which is headed "Construction of Buildings." The projection here has nothing to do with the construction of a building; it is something attached to a building. There was no need to deal in Part VI. with projections of this kind; power to deal with them where they are an annoyance or dangerous has been already given by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 119. If the magistrate's decision be right, a great number of things which commonly project from houses and buildings

(1) 11 & 12 Vict. c. 43, s. 11 : "In all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

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in the metropolis—such as flower-boxes, the Royal arms over tradesmen's shops, flag-staffs, &c.—are unlawful unless the county council have consented to their being put up. Sect. 73 of the Act of 1894 was not intended to cover the case of projections of that kind.

Secondly, this prosecution is barred by s. 11 of the Summary Jurisdiction Act, 1848, because the complaint was made more than six months after the matter of the complaint arose. The offence was completed when the projection was put up, and there are no words in the statute to make it a continuing offence. The conviction is under s. 200 of the London Building Act, 1894. Sub-s. 3 provides that "Every person who (*c*) fails to comply with any of the provisions of Part VI. of this Act" shall be liable to a penalty of 20*l*. a day during every day of the non-compliance. That provision only applies to offences which are expressly made continuing offences by the Act. The magistrate has imposed the penalty under sub-s. 11, which provides that any person who (J) "does any other thing" (i.e., other than certain specified things in the sub-section) "prohibited by this Act, or omits to do any other thing which he is required to do under or in pursuance of this Act, shall be liable to a penalty not exceeding 40*s*. and to a daily penalty not exceeding the like amount." The principle of *London County Council* v. *Cross* (1) and *Marshall* v. *Smith* (2) applies to this case. The decision in *Metropolitan Board of Works* v. *Anthony & Co.* (3) is not an authority contra, because there the Act itself in terms made the offence a continuing offence.

Thirdly, on the facts stated in the case the appellant was not the person who ought to have been convicted if the offence was committed: *Welsh & Son* v. *Corporation of West Ham.* (4) He did not put up the projection. [He also referred on the second point to *Coggins* v. *Bennett.* (5)]

Horace Avory, for the respondents. First, the magistrate's decision was right. Sect. 73 of the London Building Act,

(1) (1892) 66 L. T. 731.
(2) (1873) L. R. 8 C. P. 416.
(3) (1884) 54 L. J. (M.C.) 39.
(4) [1900] 1 Q. B. 324.
(5) (1877) 2 C. P. D. 568.

1894, must be read with s. 22, which gives power to deal with all projections which are part of the building itself. Sect. 73 would be unnecessary if the contention for the appellant were well founded; but it was intended to cover a different subject-matter. The distinction between the two sections has been pointed out in *Coburg Hotel* v. *London County Council*. (1) The intention of the Legislature in s. 73 was to render all projections not expressly excepted by the Act subject to the licence of the county council.

Secondly, the offence here was a continuing offence, so that the limitation imposed by s. 11 of the Summary Jurisdiction Act, 1848, does not apply: *Metropolitan Board of Works* v. *Anthony & Co.* (2); *London County Council* v. *Worley*. (3) The cases cited for the appellant are not in point. In *London County Council* v. *Cross* (4) there was nothing in the statute which made the offence a continuing offence, and the decision in *Marshall* v. *Smith* (5) turned upon the form in which a by-law was drawn. That case was considered, and distinguished, in *Rumball* v. *Schmidt* (6), which is also an authority in support of the view that there was a continuing offence in the present case. In its nature the offence is a continuing one, and, upon a consideration of the whole of the Act of 1894, it is submitted that all these offences—whether erecting buildings or making projections without the consent of the county council—are deemed to be continuing offences. Sect. 200, sub-s. 3 (*c*), is a clear indication that the offences specified in Part VI., in which is s. 73, are deemed to be continuing offences.

[He was not required to argue the third point taken for the appellant.]

Feb. 16. The following judgment of the Court (Bruce and Phillimore JJ.) was read by

BRUCE J. In this case we think that the sign does not constitute a projection within the meaning of s. 73, sub-s. 8, of the London Building Act, 1894. The section in question

(1) (1899) 63 J. P. 805.
(2) 54 L. J. (M.C.) 39.
(3) [1894] 2 Q. B. 826.
(4) 66 L. T. 731.
(5) L. R. 8 C. P. 416.
(6) (1882) 8 Q. B. D. 603.

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commences: "The following provisions shall [except with the consent of the council] apply to projections from buildings." In order to ascertain the meaning of the phrase "projections from buildings" used at the commencement of the section, and the meaning of the words "projection from any building" used in the last sub-section, the provisions of the whole section must be considered. The 1st sub-section provides, in substance, that every coping, cornice, string course, facia, window dressing, and such like, and every architectural projection or decoration, and also the eaves, barge boards, and cornices to any overhanging roof, shall, except as therein mentioned, be of brick, tile, or stone, or other fireproof material. We think it is clear that this sub-section refers only to projections from buildings in the nature of architectural projections or decorations, and to the overhanging parts of buildings, and it relates to the materials for the construction of the parts of buildings to which it refers. Sub-s. 2 enacts that every balcony, cornice, or other projection shall be tailed into the wall of the building, and weighted or tied down to the satisfaction of the district surveyor, and that no cornice shall exceed in projection two feet six inches over the public way. This sub-section relates only to projections in the nature of architectural projections. Sub-s. 3 lays down rules regulating the extent to which, in a street, a shop front and a cornice to a shop front may project beyond the external wall of the building to which the shop front or cornice belongs. Sub-s. 5 relates entirely to bay windows, and sub-s. 6 lays down the rule under which projecting oriel windows or turrets may be constructed. Sub-s. 7 provides that the roof, flat, or gutter of every building and every balcony, verandah, shop front, or other similar projection, or projecting window, shall be so arranged and constructed, and so supplied with gutters and pipes, as to prevent the water therefrom from dropping upon or running over any public way. We now come to the 8th sub-section, upon the construction of which the main question in the case turns. That sub-section is in these terms: "Except in so far as is permitted by this section in the case of shop fronts and projecting windows, and with the exception of water-pipes and their appurtenances,

copings, string courses, cornices, facias, window dressings, and other like architectural decorations, no projection from any building shall extend beyond the general line of buildings in any street except with the permission of the council after consulting the local authority." The whole of the preceding part of the section relates to the construction of buildings—to projections from buildings in the nature of architectural projection or decoration, or to the overhanging parts of buildings; and therefore it is plain that the projections from buildings to which the main provisions of the section apply are projections forming part of the buildings from which they project.

The question we have to determine is, whether the words in the 8th sub-section, "no projection from any building," are used in a different sense and apply to a different class of projection—whether they include such things as poles, blinds, signboards, or other structures, hung out from or attached to the outside wall of a house. Giving the best consideration we can to the words of the 8th sub-section, we think that the words "projection from any building" are there used in the same sense as in the earlier part of the section. It would be strange to find, in the last sub-section of a long section containing a code of minute provisions relating to a particular class of projections, a sudden departure from the subject to which all the preceding provisions of the section are devoted. The meaning of the two branches of the 8th sub-section we think is that, with the exception of architectural decorations of the character specified, and for an obvious reason water-pipes, no part of the structure of a building, no architectural projection not being a shop front or projecting window falling within the first branch of the sub-section, shall extend beyond the general line of buildings in any street. But it is contended by the counsel for the respondents that although the words apply to such projections as we have mentioned, yet that they are wide enough to extend to everything attached to a building and extending beyond the general line of buildings, and that they apply to a structure such as the wooden box attached to the external wall of a house by brackets as described in the case. We do not think that the words, even apart from the context,

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have so extended a meaning. A projection from a building means a part of a building projecting or jutting out; it means a prominence extending from the building in the sense of coming out from the building as part of the building. If the words are taken in this sense they fall in with the scope of the section. It is quite clear that the object of the section is to preserve the width of the street and the general line of building frontage in order to maintain architectural uniformity. But to extend the meaning of the words in the 8th sub-section to include structures not being part of the building, and not forming any part of the architectural structure of the building, would be to give an effect to the enactments altogether beyond the object to which the section seems to be directed. Further, we feel strengthened in the conclusion at which we have arrived by the circumstance that the 73rd section is in Part VI. of the Act, which is headed "Construction of Buildings." In another part of the same Act, where power is given to the council to deal with dangerous structures, the word "structure" is said to include "anything affixed to or projecting from any building, wall, or other structure": see s. 102. Had the Legislature intended the 73rd section to apply to a structure affixed to a building, it may fairly be assumed that it would have used in that section words similar to the words used in the 102nd section. The 103rd section and the 73rd section were not, we think, intended to overlap. In each case the Legislature uses apt words to describe the particular kind of structure to which the several provisions apply. We may add that no inconvenience seems to be likely to arise from the construction we have placed on the sub-section in question, because the council has power, under the 164th section of the same Act, to make by-laws for the regulation of lamps, signs, or other structures overhanging the public way, not being within the City; and by the 7th sub-section of s. 60 of 2 & 3 Vict. c. 47, a penalty is imposed upon any person who shall set up or continue (inter alia) any pole, blind, awning, line, or any other projection, from any window, parapet, or other part of any house, shop, or other building, so as to cause any annoyance or obstruction in any thoroughfare. And by the 119th section of the Metro-

polis Management Act, 1855, provision is made for the removal of any lamp iron, sign-post, showboard, window shutter, gate, fence, or any other projection or obstruction, placed or made against or in front of any house or building, which shall be an annoyance in consequence of the same projecting into, or being made in, or endangering or rendering less commodious, the passage along any street.

Further, as to the point raised by the case whether the prosecution of the alleged offence is barred under s. 11 of the Summary Jurisdiction Act, 1848, by lapse of time, we think it is. If any offence was committed it was, we think, complete on June 20, 1899—the date on which the said sign was completely affixed to the premises. The case of *London County Council* v. *Cross* (1) is, we think, in point.

As to the third point, we think that if the sign had been a projection within the meaning of s. 73 of the London Building Act, 1894, and the proceedings had been taken in due time, the appellant could not have escaped liability on the alleged ground that he had no power to control or alter the position of the sign without trespass.

The result of our judgment is that the conviction, determination, and order must be reversed, and we think the appellant is entitled to the costs of the appeal.

Conviction quashed.

Solicitors for appellant: *S. M. & J. B. Benson.*
Solicitor for respondents: *W. A. Blaxland.*

(1) 66 L. T. 731.

W. A.

1901
Feb. 12, 18.

LAMBERT *v.* CORPORATION OF LOWESTOFT.

Sewer—Disrepair—Liability of Local Authority for Accident arising from—Negligence.

A local sanitary authority, in whom a sewer under a highway is vested by the Public Health Act, 1875, is not in the absence of negligence liable for an accident caused to a person passing along the highway, by reason of the sewer having got out of repair.

Borough of Bathurst v. *Macpherson*, (1879) 4 App. Cas. 256, and dicta in *Municipal Council of Sydney* v. *Bourke*, [1895] A. C. 433, explained.

A sewer was constructed with due care and of proper materials by private persons under a high road. Subsequently the sewer became vested in the defendants as the local sanitary authority by virtue of s. 13 of the Public Health Act, 1875; and by ss. 15 and 19 the duty of repairing it and keeping it so as not to be a nuisance was imposed upon them. Owing to the mortar in one of the joints of the sewer having been worked away by rats a cavity was formed below the surface of the road; but the existence of that cavity was not known to and could not by the exercise of reasonable care have been discovered by the defendants. The plaintiff's horse, whilst passing along the road, broke through the crust of the road into the cavity, and was injured:—

Held, that the defendants were not liable.

Further Consideration before Lord Alverstone C.J.

The action was brought against the defendants, as the urban sanitary authority of the borough of Lowestoft, for injuries caused to the plaintiff's horse, while being driven along a road in the borough called Cambridge Road, by reason of the crown of the road having given way under the weight of the horse, owing to the defective condition of a sewer underneath the road. Cambridge Road was laid out as a street and the sewer under it was constructed about the year 1868 by the Ipswich Building Society. At that time the local authority was the Improvement Commissioners, acting under the Lowestoft Improvement Act, 1854. It was not then taken over as a highway repairable by the inhabitants at large. The town was incorporated in 1885, and in 1886 Cambridge Road was made up under s. 150 of the Public Health Act, 1875, and was taken over by the defendants in 1888. The works carried out in 1886 did not include sewering, the sewer having been pre-

viously constructed by the Ipswich Building Society. The sewer was made of brickwork built in mortar. It was connected with drains which carried off the surface drainage. The accident was caused by rats having worked away the mortar at the point where one of these drains joined the sewer, and a cavity having been formed under the roadway. At the time of the accident the surface of the road was in good repair, and there was no indication that a subsidence was likely to occur. At the trial Lord Alverstone C.J. held that there was no evidence of negligence on the part of the defendants to go to the jury. He accordingly discharged the jury, and reserved the case for further consideration, it being agreed by the parties that the Court should have power to draw all necessary inferences of fact.

Witt, *K.C.*, and *E. Wild*, for the plaintiff. The sewer was vested in the defendants by s. 13 of the Public Health Act, 1875, and by s. 15 they had the duty imposed upon them of keeping it in repair, and by s. 19 of keeping it so as not to be a nuisance. For the neglect of that duty they are responsible in damages to the plaintiff who suffered injury therefrom. That liability is not dependent upon negligence. The duty to keep in repair is absolute. A person who, however lawfully, places an artificial structure underneath a highway places it there at his peril, and is bound so to keep it that it may not be a nuisance to persons using the highway. And this is equally true of those to whom the ownership of such a structure made by others is transferred: they maintain it at their peril. In *Borough of Bathurst* v. *Macpherson* (1) the appellants, who were the road authority of the borough, constructed a drain, which got into a state of disrepair, whereby a hole was caused in the roadway, into which the plaintiff fell and was injured. The Privy Council held the appellants liable on the ground that they had caused a nuisance. When discussing that case, in the course of giving judgment in *Municipal Council of Sydney* v. *Bourke* (2), Lord Herschell said (3): "The ratio

(1) 4 App. Cas. 256. (2) [1895] A. C. 433.
(3) [1895] A. C. at p. 441.

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decidendi was that the defendants had caused a nuisance in the highway. It was entirely independent of the questions whether there was an obligation to keep the highway in repair, and whether any person injured by the breach of such a duty could maintain an action. The case was not treated as one of mere non-feasance, and indeed it was not so. The defendants had created a nuisance. Having made the drain, and failed to keep it in such a condition that the road would not fall into it, they were just as much liable as if they had made the excavation without constructing the drain, and the road had consequently subsided and become founderous. If any person other than the defendants had lawfully made the drain, and the same result had ensued, such person would undoubtedly have been liable to an action just as much as if he had dug a hole in or placed an obstruction on the highway, and his liability would have been the same whether the municipality were or were not bound to repair the highway. The owner of land adjoining a highway has been held liable to an action if he digs a hole so close to the highway as to create a nuisance to passengers lawfully passing along it. Why should the municipality be less liable than any other person, in respect of the same acts, merely because the road is vested in them and certain powers or duties in relation to its repair are committed to them?" It is obvious from that passage that, in Lord Herschell's opinion, the liability of the defendants in such a case has nothing to do with any question of want of care.

Poyser and *Low*, for the defendants. The plaintiff's action must be founded on negligence. The duties imposed by the Public Health Act on a sewer authority are not absolute duties, but only a duty to use reasonable care to keep the sewer in a proper condition: *Bateman* v. *Poplar District Board of Works* (1); *Stretton's Derby Brewery Co.* v. *Mayor of Derby* (2); *Fleming* v. *Mayor and Corporation of Manchester*. (3) Lord Herschell's dicta in the *Sydney Case* (4) do not bear the interpretation which has been put upon them.

(1) (1887) 37 Ch. D. 272.
(2) [1894] 1 Ch. 431.
(3) (1881) 44 L. T. 517.
(4) [1895] A. C. 433.

They must be read with reference to the facts of the *Bathurst Case* (1), which he was discussing. There was in the *Bathurst Case* (1) abundant evidence of negligence, the hole in the road which constituted the nuisance having been left unrepaired by the defendants after they had notice of it.

Witt, K.C., in reply.

Cur. adv. vult.

Feb. 18. LORD ALVERSTONE C.J. In this case the plaintiff brought an action against the mayor and corporation of Lowestoft for injuries sustained by a horse while passing along Cambridge Road, Lowestoft, owing to the horse's foot going through the crust of the road into a hole underneath. Running along the middle of the road was an old brick sewer constructed about the year 1868 by the Ipswich Building Society. The road was taken over by the defendants in the year 1886, when it was made up and manholes were placed at certain points communicating with the sewers, the old gully pits replaced by new and larger ones, which were connected with the then existing 6-inch drains which had been put in to take surface drainage when the sewer was originally constructed. The sewer was at a depth of some four or five feet, and the length of the 6-inch drain from the gulley pit to the sewer was between eight and nine feet.

It was proved before me, and I find as a fact, that the junction of the 6-inch drain with the sewer had been made in mortar, and that at some time rats had eaten or worked through the mortar of the joint, and had subsequently made a hole of about two feet in diameter underneath the surface of the road. The crown of the road had given in under the weight of the horse, thereby causing the injury. After the accident the road was repaired by the defendants, and the joint made good in cement. It was proved before me, and I find as a fact, that it was the common practice in the year 1868, and for some years afterwards, for sewers to be made in the way in which this sewer was constructed, namely, with mortar, and with mortar joints for the connecting drains. Nothing had occurred

(1) 4 App. Cas. 256.

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to give the defendants warning that there was anything wrong with the sewer and drains, or with the road. A previous subsidence in the road, which was suggested as having been brought to the notice of the defendants some years before the accident, was proved at the trial to be in no way connected with, and I find that it was not connected with, the sewer or the connecting drains. I held at the trial, and still hold, that there was no evidence to go to the jury of any negligence on the part of the defendants which caused or contributed to the accident. I therefore discharged the jury, the counsel on both sides agreeing that the Court, or if necessary the Court of Appeal, should have power to draw any inferences of fact necessary to decide the case.

Upon further consideration before me, counsel for the plaintiff did not rely upon negligence, nor was any argument addressed to me to shew that I was wrong in holding that there was no evidence of negligence to go to the jury, but the plaintiff sought to recover on the ground that the existence of a hole under the road caused by a defect in the sewer constituted a nuisance, and that the defendants, as the authority responsible for the maintenance of the sewers, were liable apart from negligence. In my opinion this contention cannot be successfully maintained. The responsibility of the defendants to maintain the sewers rests upon ss. 13, 15, and 19 of the Public Health Act, 1875. In fulfilling these duties they are acting under statutory authority, and it is now clearly established that under ordinary circumstances no action lies for injury occasioned by the execution of a statutory duty unless it has been negligently performed: *Geddis* v. *Proprietors of Bann Reservoir* (1); *Bateman* v. *Poplar Board of Works* (2); *Thompson* v. *Mayor of Brighton* (3); *Stretton's Derby Brewery Co.* v. *Mayor, &c., of Derby* (4), and many other cases.

It was, however, argued that if the condition of the sewer, which had been taken over by and vested in the defendants, did in fact cause a nuisance, the plaintiff could recover apart from negligence. In support of this view the case of *Borough*

(1) (1878) 3 App. Cas. 455.
(2) 37 Ch. D. 272.
(3) [1894] 1 Q. B. 332.
(4) [1894] 1 Ch. 431.

of Bathurst v. *Macpherson* (1), and particularly the language of Lord Herschell in *Sydney* v. *Bourke* (2), explaining that case, was relied upon. I am clearly of opinion that neither of those cases is sufficient to support the argument of the plaintiff. In the *Bathurst Case* (1), not only might the plaintiff have recovered upon the ground of negligence, but, as pointed out by Lord Herschell in the *Sydney Case* (2), the defective drain had caused the road to become dangerous, and no steps had been taken by the defendants in that case to prevent accidents, although they were well aware of the condition of the road. Their Lordships in the *Bathurst Case* (1) found that the appellants had caused a nuisance in the highway by the construction of the drain, by their neglect to repair it, and by leaving a dangerous hole open and unfenced. In my opinion the expressions of Lord Herschell in the *Sydney Case* (2), upon which great reliance was placed by the counsel for the plaintiff, must be construed with reference to the subject-matter under discussion, and were not intended to lay down a general rule that, simply because an accident has occurred in a road due to a latent defect in a sewer, the defendants, whose duty it is to maintain the sewer, are liable apart from negligence. I find that in this case there was nothing to warn the defendants that there was anything wrong with the sewer, nor could they by the exercise of any reasonable care have discovered the existence of the hole under the road until the accident happened. I therefore dismiss the action, and give judgment for the defendants with costs.

Judgment for the defendants.

Solicitor for plaintiff: *C. T. Martelli, for T. C. Backham, Norwich.*

Solicitors for defendants: *Sharpe, Parker & Co., for R. B. Nicholson, Lowestoft.*

(1) 4 App. Cas. 256.

(2) [1895] A. C. at p. 441.

J. F. C.

C. A.
1901
Feb. 11.

[IN THE COURT OF APPEAL.]

MOUTRIE *v.* MITCHELL.

Practice—Plaintiff suing in Formâ Pauperis — Solicitor, Assignment of—Official Solicitor—Order XVI., *r.* 26.

Except under very special circumstances the official solicitor ought not to be assigned to assist a pauper litigant under Order XVI., r. 26.

APPEAL from an order of Day J. at chambers as after mentioned.

The plaintiff in the action having obtained leave to proceed in formâ pauperis, the master made an order assigning the official solicitor to assist him under Order XVI., r. 26. The official solicitor appealed against this order to the judge at chambers. The learned judge rescinded the order.

The plaintiff in person.

H. Sutton, for the official solicitor. It is not contended that there is no jurisdiction under Order XVI., r. 26, to assign the official solicitor to act as solicitor for a pauper plaintiff, but it has never been the practice to do so, since the office of official solicitor first came into existence. It is submitted that there are strong reasons against appointing the official solicitor to act for a pauper plaintiff. It would inevitably become a practice to do so, and it would entail great hardship upon the holder of the office, as he gets no remuneration for so acting. The office was originally called that of Solicitor to the Suitors' Fund. Under 11 Geo. 4 and 1 Will. 4, c. 36, s. 15, provision was made for assigning a solicitor to pauper defendants in Chancery who were in prison for contempt—e.g., through failing to enter an appearance or put in an answer; and, subsequently, by 23 & 24 Vict. c. 149, ss. 2–5, the duty of assisting such defendants was imposed upon the solicitor to the Suitors' Fund; and, in the case of infants and lunatics, the official solicitor is often appointed to act as guardian ad litem. The Suitors' Fund was subsequently transferred to the Treasury, and all salaries and expenses formerly charged on that fund are

now paid by the Treasury. See Courts of Justices (Salaries and Funds) Act, 1869 (32 & 33 Vict. c. 91). The title of Solicitor to the Suitors' Fund has somehow become changed to that of Official Solicitor. In the case of Chancery defendants in contempt, the solicitor to the Suitors' Fund was allowed his disbursements out of the fund, and the official solicitor gets them from the Treasury. By s. 7 of the 23 & 24 Vict. c. 149, it was enacted that, in consequence of the additional duties thrown upon the solicitor to the Suitors' Fund by the Act, there should be paid to him such additional yearly salary as the Lord Chancellor should from time to time direct, not exceeding the net yearly salary of 300*l.*, such additional salary to be payable out of the same funds and in the same manner as his then present salary was payable. In the case of infants and lunatics the official solicitor usually gets his costs out of the estate. But, apart from these particular subject-matters, he would be in just the same position with regard to costs as any other solicitor assigned to act for a pauper plaintiff or defendant. In an action in the King's Bench Division the solicitor assigned to a pauper is allowed only his out of pocket costs and some allowance for his clerk's time against the other side, if the pauper succeeds, but, in the event of his failing, the solicitor has only the pauper to look to for his disbursements, and a litigant cannot proceed in formâ pauperis, unless he can prove that he is not worth 25*l.*, his wearing apparel and the subject-matter of the litigation only excepted. The old practice in Chancery with regard to pauper litigants is stated in the case of *Lewis* v. *Kennett*. (1)

The practice was to assign one of the Six Clerks who appointed one of the Sixty Sworn Clerks to act for the pauper litigant, and, seeing that the office of the clerks was a most lucrative monopoly, that may not have been considered a hardship. The old practice in Chancery was that, when a pauper plaintiff succeeded, he got what were called "dives costs" from the defendant, and this practice is reproduced in Order XVI., r. 31, but in common law actions there appears to be no provision for any remuneration for his services to the solicitor

(1) (1829) 3 Russ. 466.

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assigned to a pauper if he succeeds. See *Carson* v. *Pickersgill & Sons*. (1) If the official solicitor were to be assigned, wherever the pauper litigant did not suggest another solicitor, it would become a general practice for pauper litigants to ask to have the official solicitor assigned to them, and his position would really become untenable. [He also cited *Johnson* v. *Lindsay & Co.* (2)]

A. L. SMITH M.R. The plaintiff in this case having obtained leave to proceed in formâ pauperis, the master assigned the official solicitor to act for him in the action. The official solicitor appealed against that order to the judge, who reversed it. The plaintiff appeals against that reversal. The first question is whether there was jurisdiction to assign the official solicitor to act for the plaintiff. Order XVI., r. 26, provides that, "where a person is admitted to sue or defend as a pauper, the Court or a judge may, if necessary, assign a counsel or solicitor, or both to assist him, and a counsel or solicitor so assigned shall not be at liberty to refuse his assistance, unless he satisfies the Court or judge that he has some good reason for refusing." I think it is clear that there was jurisdiction to assign the official solicitor under that rule, but then the question arises whether in such circumstances as existed here it would be right to do so. The present plaintiff, when applying for leave to sue in formâ pauperis, appears not to have suggested the name of any solicitor, and thereupon the master assigned the official solicitor to assist him. The question is, what ought the ordinary practice in such cases to be? The official solicitor has certain special duties to perform, and it appears to me that he is not placed in the position which he occupies for the purpose of taking up the case of any pauper plaintiff or defendant who may want a solicitor assigned to act for him. I think that, if we were to hold that any such pauper plaintiff or defendant could have the official solicitor appointed to act for him, the effect would be to render the position of the official solicitor intolerable. There is no limitation in the terms of the rule, and therefore in a proper case, as I have said, I think there

(1) (1885) 14 Q. B. D. 859.

(2) [1892] A. C. 110.

would be jurisdiction to make an order appointing the official solicitor to act for a pauper, but I do not think that, as a rule, such an order ought to be made. Except in cases within the statutory enactments to which we have been referred, and cases in which the official solicitor acts for infants or lunatics, where he gets his costs out of the estate, the official solicitor taking up the case of a pauper plaintiff or defendant could only recover any expenses he might incur from the other side, if the pauper succeeded in the action, but if the pauper failed, he would only have the pauper to look to, and he of course would not be able to pay. It would therefore be intolerable that pauper plaintiffs in general should be allowed to have recourse to the official solicitor. The burthen is not so great when spread over the general body of solicitors. It seems to me therefore that the proper rule of practice to lay down on the subject is that, though a judge has jurisdiction to order the official solicitor to take up the case of a pauper plaintiff or defendant, he ought not to do so except under very special circumstances, and that, when a pauper applies for leave to sue or defend an action in formâ pauperis, he should put forward the name of some solicitor other than the official solicitor, whom he suggests as a proper person to be appointed; and then the judge or master will have to consider whether the person so suggested shall be assigned to act as solicitor for the pauper. I do not think that this would be imposing any unreasonable burthen on the person who wishes to proceed in formâ pauperis. For these reasons I think that the order of Day J. should stand. The plaintiff must suggest for the consideration of the master the name of some solicitor other than the official solicitor whom he may wish to have assigned to assist him.

COLLINS L.J. I am of the same opinion. I think the special provision of the statute to which we have been referred, making an addition to the salary of the official solicitor in respect of additional duties imposed on him with regard to a certain class of pauper defendants, is a strong argument against throwing another burthen upon him without payment, and I cannot find that there is any provision for any payment

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Collins L.J.

to him in such a case as this. Under these circumstances it seems to me that it would be a manifest hardship if, as a matter of routine, the duty of assisting pauper litigants should be imposed upon the official solicitor whenever the litigant does not suggest any one else. With regard to the question raised in argument as to the practice in the common law courts on the subject, I find, on looking at Chitty's Archbold's Practice, 11th ed. p. 1277, a passage which states that "Every poor person who may have cause of action, shall have writs according to the nature of his case, without paying for the sealing or writing the same; and the justices shall assign him counsel and attornies, who, together with the officers of the Court, shall act gratis"; and in connection with that statement reference is made to the statute 11 Hen. 7, c. 12. The practice so established appears to be still applicable, and I cannot find that any provision has been made for any remuneration to any attorney so assigned. I agree entirely with what the Master of the Rolls has said with reference to what the practice should be in such cases.

ROMER L.J. I agree. The official solicitor has not had cast upon him, as part of his duties as official solicitor, the duty of acting for every pauper plaintiff or defendant. He is not paid for such a duty, and it would be wrong, in my opinion, to allow a practice to grow up of appointing him to act for a pauper plaintiff or defendant as a matter of course. I therefore think that the order of Day J. in this case should be upheld. There was no special reason here why the official solicitor should have been appointed; and I think he must have been appointed by the master on some general idea that, where no particular person is suggested by the pauper litigant, the official solicitor may be appointed. I think that is a mistaken idea. The plaintiff ought to do what pauper plaintiffs in such cases usually do, namely, look about for some solicitor whose name he may suggest as that of a proper person to be assigned to act for him. As I have said, in my opinion a practice ought not to be allowed to grow up of treating it as a matter of course that the official solicitor should be assigned to assist either a

pauper plaintiff or pauper defendant. For these reasons I think the appeal should be dismissed.

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MOUTRIE v. MITCHELL.

Appeal dismissed.

The plaintiff in person ; *The Official Solicitor.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1901 *Feb.* 15.

PHARMACEUTICAL SOCIETY *v.* WHITE.

Pharmacy Acts — Sale of Poisons — Order taken by Canvassing Agent — "Seller" — Pharmacy Act, 1868 (31 & 32 *Vict. c.* 121), *s.* 15.

The defendant, a seedsman and florist at Worcester, acted as agent to receive orders for a limited company at Liverpool, who were the manufacturers of a preparation called "Weed Killer," which contained arsenic. The defendant took at his shop, for transmission to the company, an order for "Weed Killer," and received on account of the company the price of the quantity ordered, for which he gave a receipt on a bill headed with the name of the company. He subsequently transmitted the order to the company, who sent the "Weed Killer" ordered to the giver of the order direct. The defendant was in the habit of taking, and dealing with, orders for "Weed Killer" in the manner above described, and he received a commission from the company in respect of orders so transmitted by him and executed by the company. In an action in the county court against the defendant for a penalty for selling poison in contravention of the Pharmacy Act, 1868, s. 15, the county court judge gave judgment for the defendant, on the ground that the defendant was not the seller of the "Weed Killer" within the meaning of the section, and he found as a fact that the defendant was in the position merely of a canvasser for the company, with authority to receive money on their account. On appeal against his decision :—

Held (affirming the judgment of a Divisional Court) that, there being evidence to support the county court judge's finding of fact, the Court was bound thereby, and that, upon that finding, the defendant did not sell the "Weed Killer" within the meaning of s. 15 of the Pharmacy Act, 1868.

APPEAL from the judgment of a Divisional Court (Grantham and Channell JJ.) dismissing an appeal from a county court judge. (1)

The action was brought in the county court at Worcester by

(1) [1900] 1 Q. B. 454.

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the Pharmaceutical Society under the Pharmacy Act, 1868, s. 15, to recover from the defendant a penalty of 5*l.* for having sold, or kept an open shop for retailing poisons, not being a duly registered chemist. The action was brought in respect of a transaction, which took place at the defendant's shop in Worcester between the defendant and a detective named Painter, employed by the society, with regard to a preparation called "Weed Killer," which was manufactured by a company called the Boundary Chemical Company, Limited, of Liverpool, and which contained a large quantity of arsenic. The account of the transaction which was given by the defendant, who gave evidence on his own behalf, and which was accepted as true by the county court judge, was in substance as follows. He stated that he carried on business as a seedsman and florist; that Painter came to his shop, and asked whether he sold "Weed Killer," to which he replied that he took orders for it, and sent them on to Liverpool to the firm for which he acted as agent; that Painter then asked whether he kept it in stock, to which he replied that he did not, as the law did not allow him to do so; that Painter then picked up a circular, which was produced in evidence, containing an advertisement of the "Weed Killer," and stating that it was solely prepared by the Boundary Chemical Company, Limited, Liverpool, for whom the defendant was agent, and he then said that that was the stuff for which he took orders; that he told Painter that he could either send the order on direct himself, or he, the defendant, could take it, and send it on for him; that Painter then asked him to send for two gallons for him, and the defendant thereupon took down his name and address; that Painter then asked whether he should pay for it, and the defendant said that he might, if he liked, or he might send the money direct to the firm in Liverpool; that Painter then paid for the two gallons, and the defendant's son made him out a receipt on a bill headed "Bought of the Boundary Chemical Company, Limited, Liverpool," and signed "received, J. H. White, agent." The defendant further gave evidence to the effect that he never kept the "Weed Killer" in stock; that many of his customers asked him to get it for them; that he

used to deal with their orders in the same way as he had done with the order in the present case; and that the article was always sent to the customer direct from the company at Liverpool. The defendant was paid quarterly by the company a commission of 25 per cent. on the amount of the orders sent by him to them and executed by them, and he deducted that commission from the amount received by him in respect of orders for the "Weed Killer" during each quarter. The "Weed Killer" ordered by Painter was sent to him direct by the company from Liverpool. The county court judge gave judgment for the defendant on the ground that he was not the seller of the "Weed Killer" within the meaning of s. 15 of the Pharmacy Act, 1868, and he found as facts that the defendant acted as agent only, and was in the position merely of canvasser for orders for the Boundary Chemical Company with authority to receive money on their account.

The Divisional Court affirmed his decision.

Danckwerts, K.C., and *T. R. Grey*, for the plaintiffs. The defendant was the person "selling" the "Weed Killer" within the meaning of s. 15 of the Pharmacy Act, 1868. The cases shew that the person who actually sells the poison is the seller within the meaning of the Act, although he may only sell as agent. In *Pharmaceutical Society* v. *London and Provincial Supply Association, Limited* (1), it was held that a corporation was not a person within the Act, but that the person who sold for them as their agent would be answerable under the Act, if not qualified. The judgments in that case shew that the statute contemplates that the person through whom the sale is in fact effected and managed shall be responsible. In the present case the defendant was that person. If the defendant is not responsible as seller, then there can be no person responsible in cases such as this, for *Pharmaceutical Society* v. *London and Provincial Supply Association, Limited* (1), shews that the company cannot be responsible. The result in such cases would be to let in all the mischiefs the statute intended

(1) (1880) 5 App. Cas. 857.

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to prevent. Assuming that the sale here was only conditional, and the company might have refused the order, they did not do so, and the sale in fact took place through the agency of the defendant. The delivery and the sale are distinct, and, though the company no doubt delivered the article, the defendant sold it. The facts shew that the defendant kept an open shop for sale of a poisonous article.

[They also cited *Pharmaceutical Society* v. *Wheeldon* (1); *Stallard* v. *Marks* (2); *Templeman* v. *Trafford* (3); *Pharmaceutical Society* v. *Armson*. (4)]

Cavanagh (with him *W. W. Orr*), for the defendant, was not called upon.

A. L. SMITH M.R. This is an appeal against the judgment of a Divisional Court, which affirmed the judgment of a county court judge in favour of the defendant in an action brought to recover a penalty for selling poison in contravention of the provisions of s. 15 of the Pharmacy Act, 1868. The county court judge gave judgment for the defendant on the ground that he was not the seller of the article in question within the meaning of the Act, and he found as facts that the defendant acted as agent only, and was in the position merely of canvasser for orders for the Boundary Chemical Company with authority to receive money on their account. The question is, whether there was evidence to support that finding; for, if there was such evidence, the Divisional Court could not go behind the judge's finding, nor can we, whether we should ourselves have found in the same way or not. I do not suggest that the finding of the county court judge upon the question of fact was wrong; but, even if it were, there is no appeal against it, assuming that there was evidence to support it. If the evidence given for the plaintiffs in the action stood alone, it would no doubt shew that there was a sale of an article containing poison by the defendant. But the defendant was called, and gave evidence; and the county court judge

(1) (1890) 24 Q. B. D. 683.
(2) (1878) 3 Q. B. D. 412.
(3) (1881) 8 Q. B. D. 397.
(4) [1894] 2 Q. B. 720.

believed his account of the transaction. That being so, the question is whether, upon his statement, there was evidence upon which the county court judge was entitled to find as he did.

The question, who is a seller within the meaning of the Act, was dealt with in the case of *Pharmaceutical Society* v. *London and Provincial Supply Association, Limited* (1), in the House of Lords. The main question in that case was whether a corporation was a person within the meaning of s. 15 of the Pharmacy Act, 1868. On that question there had been a conflict of opinion in the Courts, a Divisional Court having held that a corporation was a person within the meaning of the Act, and the Court of Appeal having been of the contrary opinion. The House of Lords affirmed the decision of the Court of Appeal. It was argued for the plaintiffs in that case that, unless it were held that a corporation was a person within the meaning of the Act, a corporation could sell poisons without any of the safeguards provided by the Act. The House of Lords held that the argument so put forward had no solid foundation. For the purpose of dealing with that argument Lord Selborne L.C. pointed out who is the "seller" within the meaning of the Act. He said: "I will add that regard to the mischief, which, beyond all controversy, the Act was intended to prevent, leads necessarily to the same conclusion: namely, that he who sells, whether he be master or servant, whether he be the principal or a person to whom the conduct and management of sales is delegated, is struck at by the 15th section; because, otherwise, a very wide door would be opened to the evils which the Act was intended to guard against. If it were otherwise, nothing more would be necessary, according to the appellants' own argument, than that the business should belong to a person who does not himself carry it on, but who is qualified under the Act; and he might be at liberty to employ in the management of his business persons not qualified, by whom the actual sales would be conducted; and then the public would be exposed to all the dangers which

(1) 5 App. Cas. 857.

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the Act was passed to prevent. The statute, therefore, in order to be effectual, must strike at the particular acts of those who actually conduct the sales, who actually compound the medicines; and it does strike at those acts." Later on in his judgment he said: "If, my Lords, there had not been adequate safeguards against the sale of poisonous drugs in a manner contrary to the provisions of the Act by the persons actually carrying on the business for a corporation, then I think the argument would have been extremely strong against corporations being permitted to carry on the business at all; but, where you find that there are such safeguards, and that every one whom they employ will be penally answerable if he sells or compounds poisons or other medicines without having the qualification required by, or without complying with, the provisions of the Act, I am unable to conclude that the purposes and objects of the Act require a larger construction to be placed upon the word 'person' in the 1st and 15th sections than that placed upon it by the Court of Appeal." Lord Blackburn made observations to the same effect. The result of that case seems to be that, in order to be liable under the Act, a person must be the actual seller of the poison. I think that the learned county court judge obviously had that case in his mind when he found that the defendant was not the seller of the "Weed Killer," but acted merely as an agent to canvass for orders for it. It seems to me that there was good evidence upon which the county court judge was entitled to find as he did, and, that being so, we have no jurisdiction to interfere with his decision. The result is that, the defendant not having sold the article in question, he is not liable to the penalty imposed by the Act; and this appeal must be dismissed.

COLLINS L.J. I am of the same opinion. I think that this case may be decided on the short ground that the county court judge has found, as a matter of fact, that there was no contract of any kind made by the defendant and Painter. I think that, apart from that finding, nice considerations might have arisen in determining, first, whether there was any such contract,

and secondly, if there were, whether the transaction, when analyzed, came within the provisions of the Pharmacy Act, 1868; but I decide the case simply on the ground that the county court judge has found as a fact that there was no sale by the defendant. I think that the circumstances of the case come very near the point of constituting a sale by the defendant, but, unless the facts give rise to an inference of law, obliging me to say that there was a contract of sale made by the defendant, I am bound by the finding of the county court judge. There may have been a fair question on the facts whether there was a contract of sale or not, but I think it would have been a question for the jury to determine, if there had been one, and a judge would not have been justified in telling them that they were bound to find that there was a contract. That being so, the case really turns on a question of fact which has been determined by the county court judge, and there is no appeal on that question from him.

I desire to express no opinion on the question, whether, if what took place between the defendant and Painter amounted to a contract of sale, the transaction came within the mischief of the Act so as to render the defendant liable to the penalty for which the action was brought.

ROMER L.J. I agree. I also will not say what view I should have taken of the case, if I had been satisfied that the defendant had entered into a binding contract for the sale of the article in question by the company. I should have desired to consider the case further, if that had been so. It appears to me, however, that it is not conclusively established by the evidence that any binding contract was effected by what took place between the defendant and Painter, and that the facts proved before the county court judge are consistent with the view that the defendant only forwarded the order and the money to the company for them to deal with, the defendant getting a commission for so doing. I think that the county court judge meant to find as a fact that this was so. With regard to the second point raised, namely, that the defendant kept an open shop for the sale of the article in question, it

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appears to me that that point is quite unarguable. On these grounds I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Flux, Thompson & Flux.*

Solicitors for defendant: *Timbrell & Deighton, for Dobbs & Hill, Worcester.*

E. L.

1901
Feb. 28; *March* 1.

[IN THE COMMERCIAL COURT.]

VIGERS BROTHERS *v.* SANDERSON BROTHERS.

Sale of Goods—Contract—Goods not according to Specification—Right to Reject—Stipulation against Rejection.

A contract for the sale of laths to be shipped, and to be "about the specification stated below," provided that the property in the goods was to be deemed to have passed to the buyers when the goods were put on board, and contained a clause that, if any dispute arose under the stipulations of the contract, the buyers were not to reject any of the goods, but the dispute was to be referred to arbitration. The sellers having put on board laths which were not of the specified lengths:—

Held, that the buyers were justified in rejecting these laths on their arrival in this country, and were not bound by the terms of the contract to accept them subject to an allowance to be fixed by arbitration.

ACTION tried before Bigham J. without a jury in the Commercial Court.

The following statement of facts is taken from the written judgment of the learned judge.

"This action is brought to recover 1307*l.*, the price of a quantity of sawn laths sold by the plaintiffs to the defendants, or, in the alternative, for damages for non-acceptance of the same. By two contracts, dated respectively November 23, 1899, and December 16, 1899, the plaintiffs sold to the defendants two parcels of sawn laths, to be shipped at Wasa for Hull, of 'about the specification stated below.' The contracts contained provisions to the following effect: Ship room was to be provided by the buyers; payment was to be made by cash or bills against documents; and if the goods were not taken

within a certain time, then acceptances were to be given for an approximate amount; the property in the goods was to be deemed, for all purposes except retention of vendors' lien for unpaid price, to have passed to the buyers when goods were put on board; and, 'should any dispute arise under the stipulations of the contracts, buyers shall not reject any of the goods nor refuse acceptance of the drafts, but the dispute shall be referred to arbitrators whose award on all points shall be final.' The specification in the first contract was for laths of lengths varying from two and a half feet to four and a half feet, and the specification in the second contract was for laths of lengths varying from two feet to four and a half feet, but not more than 3 per cent. of two feet. Under these contracts, and in pretended fulfilment of them, two parcels of laths were shipped by or on behalf of the plaintiffs in the *Ella*, a ship provided by the defendants. The shipment under the earlier contract contained 33 per cent. of laths five feet long (a length not mentioned in the specification); and the shipment under the later contract contained about 60 per cent. of laths two feet long, instead of not more than 3 per cent. The defendants rejected the goods, and refused to accept the drafts. The question is whether the rejection was justifiable."

Robson, K.C. (*Loehnis* with him), for the plaintiffs. The defendants had no right to reject the goods, even if they were not in accordance with the specifications. There was, at any rate, a substantial compliance with the terms of the contracts, which were for "sawn laths," and, if the laths were not of the lengths provided by the specifications, that was ground only for a reference to arbitration, and for the making of such allowance as might be found by the arbitrator to be just. Secondly, if the defendants had the right to reject the goods, they have waived that right. The goods were accepted by the captain of the ship as their agent, and by the terms of the contracts the property in the goods passed to the defendants when he received them on board the ship.

Scrutton, K.C., and *F. D. MacKinnon*, for the defendants. The defendants were not bound to accept these laths. It is

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clear that, apart from the clause in the contracts, the property would not have passed: Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 5 (1.), s. 19, sub-s. 1. The effect of the clause in the contracts is that if goods which are within the contracts are put on board the property passes, and the defendants cannot reject them, but can only claim for an allowance if they are not in accordance with the specifications. The clause refers to difference in quality, and not to difference in kind: *Azémar* v. *Casella*. (1)

The captain of the ship was not the defendants' agent to accept the goods. Acceptance means such an acceptance as would preclude the purchaser from objecting to the quality of the goods (2), and there is no evidence of any such acceptance here.

Robson, K.C., replied.

Cur. adv. vult.

March 1. BIGHAM J. read the following judgment, after stating the facts above set out:—On the one hand the plaintiffs say that the defendants must take the goods subject to an allowance for any loss due to the failure to comply with the specifications. On the other hand the defendants say that the goods are not what they bought, and that therefore they are not bound to accept them. I have heard evidence as to the value of laths two feet long, and as to the value of laths five feet long, and I find as a fact that neither length is worth the contract price; the former is practically worthless and the latter is very difficult to sell in large quantities, and requires more labour in handling than the shorter lengths. Neither shipment can, in my opinion, be regarded as in any sense a compliance with the contracts, unless the clause as to non-rejection is sufficient to make it so. The plaintiffs say it is. They say that it is competent for them to disregard the specifications altogether and to ship laths of any lengths, even of lengths wholly outside the specifications, and to require the defendants to take and pay for such goods subject to an

(1) (1867) L. R. 2 C. P. 431, 677.
(2) *Norman* v. *Phillips*, (1845) 14 M. & W. 277.

allowance. They rely on the words "should any dispute arise, buyers shall not reject any of the goods." I am not myself disposed to give to these words the meaning contended for. It is not the meaning which the parties ever intended should be put upon them, and it is a meaning which might, and in the present case would, have the effect of forcing the buyer to take goods which did not in any sense represent what he wished to buy. The main object of these contracts was to effect a sale, and to secure a delivery of two parcels of goods commercially within the description in the specifications; the goods are to be "the undermentioned parcel of goods of about the specification stated below," and at the bottom of the contracts are set out the specifications. The clauses of the contracts must be read and interpreted consistently with this main object, and not so as to destroy it. What, then, is the meaning to be put on the clause as to non-rejection? It is in my view no more than this. In a business of this kind there is almost of necessity some departure from the strict figures of the specifications, and the departure may be such as to make it doubtful whether the shipper has adhered sufficiently closely to the stipulation that the goods shall be of "about" the specification lengths. In such a case the clause as to non-rejection comes into operation. It does not operate so as to force the buyer to take goods which are neither within nor about the specification, nor commercially within its meaning. I am fortified in my construction of the contracts by the view which the plaintiffs themselves took of the matter when the shipments came forward. The plaintiffs had themselves bought the goods of other vendors, and, when the defendants in this action refused to accept, the plaintiffs wrote two letters to their vendors. In these letters the plaintiffs set up the right to reject the goods which were not in accordance with the specifications on the ground that they were goods "which they did not buy." I think they were justified in taking up this position towards their vendors, and it follows that they cannot complain that their purchasers are doing the same. I may add in this connection that the defendants have always been ready and willing to take and pay for such part of the goods

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Bigham J.

as came within the specifications, but the plaintiffs have refused to allow this, insisting on the defendants accepting the whole of both lots. Two other points were taken by the plaintiffs. It was said that by the terms of the contracts the property in the goods had passed on shipment, or, in the alternative, that the property had passed by reason of the defendants having accepted the goods by receiving them on board their ship, and that, therefore, the defendants must keep the goods and be satisfied with an allowance in respect of their inferiority. I think there is nothing in either of these points. The provision in the contracts as to the passing of the property only applies to a shipment of goods which come within the meaning of the contract; it cannot apply to any others; and the receipt of the goods by the captain is no acceptance at all of the goods as a delivery under the contract. The captain of the ship is merely an agent to receive the goods for the purpose of carriage; he knows nothing of the contract of purchase, and is not an agent to accept delivery under it.

Judgment for the defendants.

Solicitors for plaintiffs: *Trinder, Capron & Co.*

Solicitors for defendants: *Pritchard & Sons, for A. M. Jackson & Co., Hull.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1901
Feb. 22.

INMAN *v.* ACKROYD & BEST, LIMITED.

Company—Director—Remuneration—Yearly Payment.

Articles of association of a limited company provided that the directors should be paid out of the funds of the company by way of remuneration for their services "the sum of 125*l.* per annum, per director, and such further sums as shall from time to time be determined by the company in general meeting, and the same shall be divided among them in such proportion and manner as the directors by agreement may determine, and in default of such determination equally." In an action by a director, who had resigned after serving for a part of a year, to recover remuneration in respect of his services during that period:—

Held, that the articles of association did not entitle a director to recover remuneration for any less period than a year.

Salton v. *New Beeston Cycle Co.*, [1899] 1 Ch. 775, approved.

Swabey v. *Port Darwin Gold Mining Co.*, (1889) 1 Megone, Comp. Cas. 385, distinguished.

APPEAL from a judgment of Bruce J.

The action was brought to recover from the defendant company, of which the plaintiff had been a director, remuneration for his services claimed to be due under the articles of association. The 81st article was as follows: "The directors shall be paid out of the funds of the company by way of remuneration for their services the sum of 125*l.* per annum, per director, and such further sums as shall from time to time be determined by the company in general meeting, and the same shall be divided among them in such proportion and manner as the directors by agreement may determine, and in default of such agreement equally. The said sum of 125*l.* per annum may be increased, but not diminished, by the company in general meeting."

Under art. 82 the office of director was to be vacated—"(*d*) If by notice in writing to the company he resigns his office"; and by art. 89, "The company may by extraordinary resolution remove any director before the expiration of his period of office, and may by ordinary resolution appoint another

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qualified person in his stead. The person so appointed shall hold office during such time only as the director in whose place he is appointed would have held the same if he had not been removed."

The plaintiff became a director and served in that capacity for a year and seven months, and at the end of that time he resigned by notice in writing. This action was brought to recover remuneration for the whole period of service. The claim as to service for twelve months was admitted, and money was paid into court to meet it. The claim of the plaintiff for remuneration for the subsequent seven months was disputed, on the ground that by the articles of association payment could only be recovered for an entire twelvemonth, and that no proportionate remuneration was payable for any less period. On this point the learned judge gave judgment for the defendants.

The plaintiff appealed.

Edward Bray, for the plaintiff. Art. 81 is capable of another construction than that put on it by the learned judge. It is clear from arts. 82 and 89 that the case of a director serving for only part of a year, and then ceasing to serve either by resignation or by being dismissed, was contemplated. In *Swabey* v. *Port Darwin Mining Co.* (1) the report is wrong in stating that the directors were to be remunerated "at the rate of" 200*l.* a year. This appears from the articles of association of the defendant company in that case. They shew that the directors were to be paid 200*l.* a year, and the articles provided further for resignation or dismissal. The cases are therefore similar, and the conclusion of the Lord Chancellor that the articles as to resignation or dismissal shewed that service for a less period than a year was contemplated, and ought to be paid for, is applicable to the present case. It is not contended that the plaintiff has any claim otherwise than under the articles; but they should be read together, and they shew that it was not intended to create such an unjust situation as would arise if a director served one day less than a year, and could

(1) 1 Megone, 385.

not recover for his services. When the articles are read together, they shew that the directors are to be remunerated "at the rate of" 125*l.* a year.

The Apportionment Act, 1870 (33 & 34 Vict. c. 35), applies, for annuities, and therefore by the interpretation clause (s. 5) salaries, are apportionable, and there is no express stipulation in the articles to exclude the operation of the Act under s. 7.

A. Llewelyn Davies, for the defendants, was not called on.

A. L. SMITH M.R. This is an appeal from a judgment of Bruce J., who found against the plaintiff. The action was brought against the defendant company to recover directors' fees, and the plaintiff to make out his claim must prove a contract to pay him the fees he claims. He had acted as director for a year and seven months, and the defendants have paid into court the amount due to the plaintiff for the whole year in which he acted as director, and the question is whether the articles of association of the company give him the right to receive the fees for the further seven months during which he was director. The present case differs from *Swabey* v. *Port Darwin Mining Co.* (1), to which reference has been made, whether we take the account given in the report of the bargain as to directors' fees or refer to the articles, copies of which have been produced in court. According to the report, the agreement was for remuneration at the rate of 200*l.* a year. In the printed articles the words "at the rate of" do not appear, but it is provided that the directors shall each receive by way of remuneration out of the funds of the company 200*l.* a year. The article of association in the present case is that the directors, that is the whole body of them, shall be paid by way of remuneration for their services the sum of 125*l.* per annum per director, so that there is a lump sum in proportion to the number of directors, and that sum is to be divided among them in such proportion and manner as they may determine by agreement, and in default of such determination equally. It is suggested that the words "at the rate of" should be read in; but that is not the form of the article, and I do not think that

(1) 1 Megone, 385.

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it was the intention. I think, therefore, that the judgment of my brother Bruce was right, and the two cases, *Salton* v. *New Beeston Cycle Co.* (1) and, *In re Central De Kaap Gold Mines* (2), which he cites in his judgment support this view, while the case of *Swabey* v. *Port Darwin Mining Co.* (3) is distinguishable. As to the question raised under the Apportionment Act, I cannot see that there is anything to apportion.

COLLINS L.J. I am of the same opinion. On whatever hypothesis the case of *Swabey* v. *Port Darwin Mining Co.* (3) was decided, it does not touch the present case, because by the special provisions of the articles of the defendant company no fixed sum is payable to any given director. The article provides for the payment of a sum the amount of which is dependent on the number of directors, and when that sum is ascertained the proportion to be received by each director is to be agreed on by the directors, or, in default of agreement, the sum is to be divided equally. That manifestly refers to an annual distribution of the annual amount payable under the articles. Any director who goes out of office before the end of the year has no claim to any part of the sum to be distributed. I agree with the judgment of Bruce J. with this limitation—that I prefer to express no opinion on the second alternative that he puts. The learned judge said that the meaning of the article was "that the aggregate sum must depend upon the number of directors who have completed a year's service, or at least upon the number of directors who are serving at the time the annual sum is paid out of the funds of the company." On the second alternative I give no opinion.

ROMER L.J. I agree.

Appeal dismissed.

Solicitors for plaintiff: *Clements, Williams & Co.*

Solicitors for defendants: *Walker & Rowe, for E. O. Wooler, Burrows & Burton, Leeds.*

(1) [1899] 1 Ch. 775. (2) W. N. (1899) 216.
(3) 1 Megone, 385.

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[IN THE COURT OF APPEAL.]

C. A.
1901
Jan. 29.

THE PRESIDENT AND FELLOWS OF SION COLLEGE, APPELLANTS; THE MAYOR AND COMMONALTY AND CITIZENS OF THE CITY OF LONDON, RESPONDENTS.

Statute—Construction—Exemption from Taxes and Assessments—City of London—Consolidated Rate—7 Geo. 3, *c.* 37, *s.* 51—*City of London Sewers Act*, 1848 (11 *&* 12 *Vict. c. clxiii.*), *s.* 169.

Sect. 51 of 7 Geo. 3, c. 37, provides that certain lands in the City of London, reclaimed from the Thames, should vest in the adjoining owners "free from all taxes and assessments whatsoever."

The City of London Sewers Act, 1848, authorized the collection of a consolidated rate. Some of the objects to which the rate was to be applied were of a kind for which rates were made at the time of the passing of the Act of George III., but others were new. On appeal against an assessment to the consolidated rate made on land reclaimed under the Act of George III.:—

Held, that the exemption applied only to then existing taxes and assessments, or others substituted for them, and that the consolidated rate, although it included some purposes for which rates were made when the exemption was created, was substantially a new assessment, and was therefore not within the exemption.

APPEAL from a judgment of a Divisional Court, reported [1900] 2 Q. B. 581, on a special case stated on an appeal to quarter sessions.

The respondents, acting in pursuance of the City of London Sewers Acts, 1848 and 1851 (11 & 12 Vict. c. clxiii. and 14 & 15 Vict. c. xci.), and the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), and the Acts amending the same, made a consolidated rate at 2*s.* 5*d.* in the pound, including 1*s.* 2*d.* in the pound for the school board. The appellants were assessed in respect of all the premises which they occupied. A part of those premises, consisting of buildings, was upon land which had been reclaimed from the river Thames under the statute 7 Geo. 3, c. 37, passed in the year 1766, and the questions arising on the appeal related solely to that part of the appellants' premises. The appellants acquired their premises in 1886,

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and from that time, until the rate appealed against was made, they had not been assessed in respect of the part of their premises as to which the appeal was brought.

The Act 7 Geo. 3, c. 37, dealt, among other things, with the embankment of a part of the bed of the Thames near Blackfriars Bridge, and the owners of wharfs abutting on that land were authorized to inclose that part of it opposite their premises.

By s. 51, the ground so to be inclosed and embanked was to vest in the owner or owners of the adjoining wharf or ground "free from all taxes and assessments whatsoever."

By the City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.), s. 168, the Commissioners appointed under the Act were empowered to make rates for the purposes of the Act, including a consolidated rate for the purpose of forming, making, maintaining, keeping in repair, paving, lighting, sweeping, cleansing, and watering the streets within the City; making and carrying into effect improvements; constructing, altering, repairing, and cleansing sewers, and otherwise maintaining effectually the drainage of the City; defraying salaries of officers and incidental expenses, attending the execution of the powers and duties of the Commissioners under the Act, and securing, raising, and paying moneys and the interest thereof borrowed on the security of the consolidated rate. By s. 169, the rates were to be levied on persons occupying any house or building within the City "whether such person shall be now liable in respect of such house or building to be assessed to the relief of the poor, or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house or building being situate in any precinct or extra-parochial place or otherwise."

By the 1st schedule to the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), the expenses of the school board for the metropolis are, so far as the City of London is concerned, charged on the consolidated rate.

The question for the opinion of the Court was whether the part of the appellants' premises which came within 7 Geo. 3, c. 37, was exempt by virtue of s. 51 of the Act from the

consolidated rate authorized by the City of London Sewers Act, 1848.

The Divisional Court (Grantham and Channell JJ.) gave judgment in favour of the respondents on the ground that the provisions of the later Act repealed by implication the exemption given by the earlier Act. (1) As no judgment was given in the Court of Appeal on this point, the arguments bearing on it are omitted from this report.

The appellants appealed.

H. Avory, for the appellants. The cases that have been decided on the Act of George III., shew that the exemption conferred by s. 51 holds good with regard to all taxes and assessments, which, though imposed by later statutes, are of the same kind as those that were in existence when it was passed. The alteration of a name or of some of the particulars of a tax or assessment cannot affect the exemption, if the subsequent tax or assessment is substantially of the same kind as the previous one: *Eddington* v. *Borman* (2); *Williams* v. *Pritchard* (3); *Perchard* v. *Heywood* (4); *Rex* v. *London Gas Light Co.* (5) The consolidated rate does, no doubt, include the school board rate, but the rate is an entirety, and the purposes for which the main part of the rate is raised are similar to those in respect of which rates were made under previous Acts. Rates for the purposes of repairing, constructing, and cleansing sewers, and for lighting and cleansing and watering streets in the City of London, existed before the year 1848: see *Eddington* v. *Borman* (2), and were subjects of exemption under the Act of George III.

Danckwerts, Q.C., for the respondents. The cases which have been cited shew that the only exemption under the Act of George III. was from taxes and assessments then in existence. The ground of the decision in *Williams* v. *Pritchard* (3) was that though the land tax which was there in question was imposed annually by a fresh Act, it was substantially the same

(1) [1900] 2 Q. B. 581.
(2) (1790) 4 T. R. 4.
(3) (1790) 4 T. R. 2; 2 R. R. 310.
(4) (1800) 8 T. R. 468.
(5) (1828) 8 B. & C. 54.

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tax as existed under the previous Acts. *Rex* v. *London Gas Light Co.* (1) was decided on a similar ground, namely, that the exemption from poor-rate was not taken away by subsequent Acts, which merely altered the mode of making and raising these rates. The consolidated rate covers other purposes than and purposes widely different from those covered by rates in existence when the Act of George III. was passed. A new subject-matter, for instance, is the repayment of borrowed money and interest, and much larger powers are given than had previously existed as to the reconstruction of sewers and communication with sewers of outside districts, and the expenses incurred in respect of these enlarged powers fall on the consolidated rate.

H. Avory, in reply.

A. L. SMITH M.R. The question that arises on this appeal is whether the president and fellows of Sion College are liable to be assessed to a rate called a consolidated rate made by the respondents under statutory authority. The answer to this question depends on two Acts of Parliament. The first of these was passed in the year 1766, and at that time certain land on the north side of the river Thames, on which part of Sion College now stands, formed a portion of the bed of the river. It appears from the Act that it was desired to embank that part of the river, and, put shortly, the Act provided that, if the frontagers embanked the river bed adjoining their holdings at their own expense, the reclaimed lands should be vested in them freed from all taxes and assessments whatsoever. I pass now to the other Act, which came into force in 1848. In that year an Act was passed by which Commissioners of Sewers for the City of London were brought into being, and large powers were conferred on them of improving the City, large powers of borrowing money to carry out the improvements, and, by s. 168 of the Act, they were empowered to create a consolidated rate not exceeding 1*s.* 6*d.* in the pound for the purpose of making, maintaining, paving, lighting, sweeping, cleansing, and watering the streets within the City, making

(1) 8 B. & C. 54.

and carrying into effect improvements, constructing, altering, repairing, and cleansing sewers, defraying salaries of officers and incidental expenses attending the execution of the duties of the Commissioners under the Act, and securing, raising, and paying moneys and the interest thereon borrowed on the security of the consolidated rate. It cannot be doubted, if that section stood alone, that the owners of Sion College would be liable to this consolidated rate; but the allegation is that the college is exempt because there are to be found in the Act of George III. those words relating to the vesting of the reclaimed ground in the adjacent frontagers which shew that it was to vest "free from all taxes and assessments whatsoever," so that the appellants by virtue of this clause are exempt from the consolidated rate. I do not think it necessary to decide to-day what effect is to be given to the final words of s. 169 of the Act of 1848, which declare that the rates, including the consolidated rate, are to be levied on the occupier of a house or building whether he is liable to be assessed to the relief of the poor or "be not liable to be assessed to the relief of the poor in respect thereof by reason of such house or building being situate in any precinct or extra-parochial place or otherwise." The governing point in this case is what is the extent of the exemption under the former Act. Do the words give exemption from all rates whensoever made, or only from such rates and assessments as were then in existence? We are not left without authority on this point, because, as it seems to me, in the cases cited to us a judicial interpretation has been put on the words that we are considering. The result of the decisions in *Williams* v. *Pritchard* (1), *Perchard* v. *Heywood* (2), and *Rex* v. *London Gas Light Co.* (3) is that the Act only created an exemption from taxes and assessments then in existence, and not from substantially new ones coming into existence at a later date. In my view this consolidated rate is substantially new. I agree that in it are some incidents which would appertain to the old rates in existence in 1766, but I cannot look at the wide purposes of the consolidated rate

(1) 4 T. R. 2; 2 R. R. 310. (2) 8 T. R. 468.
(3) 8 B. & C. 54.

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without seeing that it was substantially a new rate. Therefore, on the authorities to which I have referred, the appellants cannot bring themselves within the exemption, and the judgment of the Divisional Court must be affirmed. On the point whether the exemption contained in the earlier Act has been repealed by the subsequent Act I give no opinion.

COLLINS L.J. I am of the same opinion. The difficulty in the way of the argument put forward on behalf of the appellants lies in the decisions in the Term Reports that have been cited in argument, which seems to establish that the exemption in the Act of George III. was from taxes and assessments then existing with the possible extension to substituted taxes suggested by Bayley J. in *Rex* v. *London Gas Light Co.* (1), where the learned judge said: "The house and window tax was a new one imposed after the exemption was given; and the exemption may be considered analogous to a covenant to pay taxes which applies to old taxes or others substituted for them, but not to taxes entirely new, unless there are express words to give it such extensive operation." That being so, we have to deal with the question whether the exemption extends to the consolidated rate. It seems to me, looking at the numerous subject-matters embraced in that rate, which were not known when the earlier Act came into existence, the inference is that the consolidated rate is a new rate, and not the less so because it embraces some things incident to the earlier rates. If this is correct, the consolidated rate is not within the limits of the exemption contained in the Act of George III. It is not necessary to go into the question whether the words of the Act of 1848 are sufficient to take away the exemption given by the earlier Act, and on that point I give no opinion.

ROMER L.J. I agree. Having regard to the decisions to which our attention has been called, and to the fact of their long standing, it would not be open to this Court to review the interpretation placed on the Act of 1766 that the exemption in s. 51 does not extend to taxes and assessments not in existence

(1) 8 B. & C. 54.

at the time the Act was passed. We have, therefore, to consider whether the consolidated rate established under the Act of 1848 was substantially a new assessment. I am of opinion that we cannot on the facts avoid coming to a conclusion that it is so. Looking at the variety of purposes for which the rate was created, and the very wide field that is covered, I think we can come to no other conclusion than that it is a new assessment, and not the less so because some of the purposes for which it was created were in existence at the time of the earlier Act, and assessments made to carry out those purposes would have come within the exemption created by it. It has been suggested that a hardship on the appellants and others in like case will follow from such a conclusion; but if so it is created by the Act of 1848, and it is not within our province to alter the enactment. That the Act was intended to interfere with some exemptions from taxes and assessments is clear; but whether its effect is to do away with the exemption which otherwise would affect the appellants is a matter on which I give no opinion.

Appeal dismissed.

Solicitors for appellants: *Clark, Rawlins & Co.*
Solicitor for respondents: *Sir H. H. Crawford.*

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1901
Feb. 28.

[IN THE COURT OF APPEAL.]

CHAMBERS *v.* GOLDTHORPE.
RESTELL AND OTHERS *v.* NYE.

Building Contract—Architect's Certificate—Architect in Position of Arbitrator —Negligence.

A building owner employed an architect for reward to supervise the erection of certain houses by a contractor. The building contract provided for payments on account of the price of the works during their progress, and for payment of the balance after their completion, upon certificates of the architect, and that a certificate of the architect, shewing the final balance due or payable to the contractor, should be conclusive evidence of the works having been duly completed, and that the contractor was entitled to receive payment of the final balance:—

Held, by A. L. Smith M.R. and Collins L.J., Romer L.J. dissenting, that the architect, in ascertaining the amount due to the contractor and certifying for the same under the contract, occupied the position of an arbitrator, and therefore was not liable to an action by the building owner for negligence in the exercise of those functions.

APPEALS from the Queen's Bench Division.

In the first of the above-mentioned cases the appeal was from the judgment of a Divisional Court (Channell and Bucknill JJ.) allowing an appeal from the county court of Yorkshire holden at Holmfirth.

In the second case the appeal was from the judgment of Mathew J. at the trial before him without a jury.

In the first of the above-mentioned actions the plaintiff sued the defendant in the county court for work done by the plaintiff as an architect for the defendant in relation to the building of certain houses. The defendant admitted the claim, but counter-claimed against the plaintiff for negligence in his conduct for the defendant, as his architect, of business undertaken by the plaintiff for the defendant for reward, the alleged negligence being the negligent measuring up of work done by the contractor for the erection of the houses, and permitting him to include in his accounts sums to which he was not entitled, and certifying such accounts, whereby the defendant suffered loss.

The defendant had employed the plaintiff, as his architect, to prepare drawings, plans, and specifications for the houses, and to supervise the execution of the work, and was to pay the plaintiff a commission upon the cost of the work.

By the terms of the building contract between the defendant and the contractor employed to erect the houses, it was provided that the contractor should execute the works in accordance with the drawings and specifications for a lump sum named. The architect employed by the defendant was to have at all times access to the works, which were to be completely under his control. The contractor was not to deviate from the drawings or specifications except on the written authority of the architect. By clause 8 of the contract any authority given by the architect for any alteration or addition in or to the works was not to vitiate the contract, but all additions, omissions, or variations for which a price had not been previously agreed upon were to be measured, and valued, and certified for by the architect and added to or deducted from the amount of the contract, as the case might be, according to the schedule of prices annexed, or where the same might not apply at fair measure and value. By clause 10 of the contract the architect was to have full power to require the removal from the premises of all materials which in his opinion were not in accordance with the specification, and to require other proper materials to be substituted. By clause 11 of the contract it was provided that, should any of the works be, in the opinion of the architect, executed with improper materials or defective workmanship, the contractor should, when required by the architect during the progress of the work, forthwith re-execute the same, and substitute proper materials and workmanship, and, in case of default of the contractor is so doing within a reasonable time, the architect was to have power to employ other persons to re-execute the work, and the cost thereof was to be borne by the contractor. By clause 12 of the contract any defects, shrinkage, and other faults which might appear within six months from the completion of the building, and arising out of defective or improper materials or workmanship, were, upon the direction of the architect, to be amended, and made good

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by the contractor at his own cost, unless the architect should decide that he ought to be paid for the same. By clause 16 the contractor was to complete the works within a certain time, unless delayed by inclement weather, or causes not under his control, or in case of strike or lock-out affecting the building trades, for which due allowance was to be made by the architect, and then the work was to be completed within such time as the architect should consider reasonable and from time to time in writing appoint, and in case of default the contractor was to pay certain weekly sums as liquidated damages, until the works were completed, provided the architect should in writing certify that the works could have been reasonably completed within the time appointed. By clause 19 of the contract, when the value of the works executed, and not included in any former certificate, should from time to time amount to the sum of 30*l.*, or otherwise at the architect's reasonable discretion, the contractor was to be entitled to receive payment at the rate of 80 per cent. upon such value, until the difference between the percentage and the value of the works executed should amount to 20 per cent. upon the amount of the contract, after which time the contractor was to be entitled to receive payment for the full value of all works executed, and not included in any former payment, and the architect was to give to the contractor certificates accordingly; and, when the works should be completed, or possession of the buildings given up to the proprietor, the contractor was to be entitled to receive one moiety of the amount remaining due, according to the best estimate of the same that could then be made, and the architect was to give to the contractor certificates accordingly, and the contractor was to be entitled to receive the balance of all moneys due or payable to him under the contract within three months from the completion of the works, or from the date of giving up possession thereof to the proprietor, whichever should first happen; provided always that no final or other certificate should cover or relieve the contractor from liability under the provisions of clause No. 12, whether or not the same was notified by the architect at the time of or subsequently to granting any such certificate. By clause 20 of the contract it was provided as

follows: "A certificate of the architect, or an award of the referee hereinafter referred to, as the case may be, shewing the final balance due or payable to the contractor, is to be conclusive evidence of the works having been duly completed, and that the contractor is entitled to receive payment of the final balance, but without prejudice to the liability of the contractor under the provisions of clause No. 12." Clause 22 was as follows: "Provided always that, in case any question, dispute, or difference shall arise between the proprietor, or the architect on his behalf, and the contractor as to what additions, if any, ought in fairness to be made to the amount of the contract by reason of the works being delayed through no fault of the contractor, or by reason or on account of any directions or requisitions of the architect, involving increased cost to the contractor beyond the cost properly attending the carrying out of the contract according to the true intent and meaning of the signed drawings and specifications, or as to the works having been duly completed, or as to the construction of these presents, or as to any other matter or thing arising under or out of this contract (except as to matters left during the progress of the works to the sole decision or requisition of the architect under clauses 10 and 11), or in case the contractor shall be dissatisfied with any certificate of the architect under clause No. 8, or under the proviso in clause No. 16, or in case he shall withhold or not give any certificate to which the contractor may be entitled, then such question, dispute, or difference, or such certificate, or the value or matter which should be certified, as the case may be, is to be from time to time referred to the arbitration and final decision of an architect, being a fellow of the Royal Institute of British Architects, to be appointed on the request of either party by the president for the time being of such institute, and the award of such referee is to be equivalent to a certificate of the architect, and the contractor is to be paid accordingly. Such award or certificate may be made a rule of Her Majesty's High Court of Justice or any court of record in England. The cost of the arbitration and award shall be in the discretion of the arbitrator."

The case for the defendant was that the plaintiff had through

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negligence incorrectly measured up the work done, and improperly allowed certain items, and had consequently certified for a larger amount than he ought to have done.

The county court judge gave judgment for the plaintiff on the claim and for the defendant on the counter-claim for damages to be assessed by arbitration. (1)

On appeal against his decision by the plaintiff the Divisional Court allowed the appeal on the ground that, the plaintiff being placed by clause 20 of the contract in the position of an arbitrator, he was not liable to an action for negligence in respect of the manner in which he had exercised his functions under that clause.

The defendant appealed against the judgment of the Divisional Court.

In the second of the above-mentioned actions, the plaintiffs, as executors of T. M. Restell, sued the defendant for negligence in the performance of his duties as the architect employed by the testator in connection with the building of a dwelling-house, the alleged negligence being that the defendant had not checked the builders' accounts with proper skill and diligence, and had improperly certified for, as extras, works included in the contract.

The defendant was employed by the testator to prepare plans and specifications for the work, and to supervise the execution of it, and he was to be paid by the testator a commission on the price of the work.

The contract between the testator and the contractors for the erection of the house was, in substance, similar to that in the first-mentioned case. Clauses 14 to 19 of the contract contained certain provisions similar to those of clauses 12, 16, and 19 of the contract in the first-mentioned case. Clause 20 of the contract provided as follows: "When the value of the works executed, and not included in any former certificate, shall from time to time amount to the sum of 200*l.*, the con-

(1) It was agreed between the parties that, to save expense, the question of law should be decided in the first instance, and that, if on appeal the county court judge's decision as to that should be upheld, the question whether in fact the plaintiff had been guilty of negligence and the damages should be referred to arbitration.

tractors are to be entitled to receive payment at the rate of 75*l.* per cent. upon such value upon obtaining the architect's certificate, a further 15*l.* per cent. upon such value within one calendar month from the completion of the works, and of which completion the contractors shall then have obtained the certificate of the architect, and the remaining 10*l.* per cent. at the expiration of a further period of three calendar months from such last-mentioned certificate, provided always that no final or other certificate is to cover or relieve the contractors from their liability under the provisions of clause 14 hereof, whether or not the same be notified by the architect at the time of or subsequently to granting any such certificate." Clause 21 was as follows: "A certificate of the architect, or an award of the referee hereinafter referred to, as the case may be, shewing the final balance due or payable to the contractors, is to be conclusive evidence of the works having been duly completed, and that the contractors are entitled to receive payment of the final balance, but without prejudice to the liability of the contractors under the provisions of clauses 14 to 20." Clause 22 was as follows: "Provided always that in case of any question, dispute, or difference arising between the employer, or the architect on his behalf, and the contractors, attending the carrying out of the contract according to the true intent and meaning of the signed plans and specifications, or as to the works having been duly completed, or as to the construction of these presents, or the said specifications, or as to any other matter or thing arising under or out of this contract, or the execution of the works hereby contracted for (except as to matters hereinbefore left during the progress of the works to the sole decision of or requisition of the architect), then such question, dispute, or difference is to be from time to time referred to the arbitration and final decision of [a person named], and the said referee's charges and costs of and incidental to the reference shall be paid by such parties as the referee shall direct, and the said reference shall be considered a reference to arbitration within the meaning of the Arbitration Act, 1889, or any statutory modification thereof, and no proceedings whatsoever shall be taken by the contractors against the

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employer until the contractors shall have obtained, and save upon, the award of the said referee, whose appointment shall be irrevocable."

Mathew J. held upon the authorities that an action for negligence would not lie against a person placed in the position in which the defendant was placed under clause 20 of the building contract, and therefore gave judgment for the defendant.

The plaintiffs appealed against his judgment.

Lowenthal, for the defendant in the first appeal. The plaintiff was not in the position of an arbitrator under the building contract. He was the paid agent of the defendant, the building owner, employed by him for the purpose of supervising the work, and protecting the interests of his employer as against the contractor; and he was therefore liable for negligence in the performance of his duty as such agent: *Rogers* v. *James*. (1) Clause 22 of the building contract provides for arbitration in the case of dispute by a person other than the architect. It was held in *Lloyd Brothers* v. *Milward* (2) by the Court of Appeal that, under a contract containing such an arbitration clause, in the event of a dispute within that clause before the architect's certificate, the architect could not give a final certificate, which shews that his position is not really that of an arbitrator. He can only give a certificate when there is no dispute, as was the case here. The idea of arbitration involves that there must be a dispute, which is referred to some person to decide judicially between the parties. A mere valuer, who is employed to settle, as between two parties, what one is to pay to the other as the price of a thing, is not an arbitrator. In this case the plaintiff was not employed to decide a dispute. He was employed and paid by the building owner as his agent to certify to him whether the contract work was properly done, and the contract price of it had therefore been earned. The cases of *Pappa* v. *Rose* (3) and *Tharsis Sulphur Co.* v. *Loftus* (4) both proceeded

(1) (1891) 8 Times L. R. 67.
(2) (1895) 2 Hudson on Building Contracts, 454.
(3) (1871) L. R. 7 C. P. 32; (1872) L. R. 7 C. P. 525.
(4) (1872) L. R. 8 C. P. 1.

on the footing that there had been a dispute between the parties which was referred; and in the latter case the defendant was not the paid agent of one of the parties, as the architect is of the building owner. In *Stevenson* v. *Watson* (1) the action was not by the building owner, but by the builder, and therefore the question in the present case did not arise. If the right of going to arbitration under clause 22 with regard to matters to be certified by the architect is confined to the builder, as to which see per Grove J. in *Clemence* v. *Clarke* (2), then it would be most unjust that the building owner should have no remedy for negligence by the architect in certifying. [He also cited on this point *Wadsworth* v. *Smith.* (3)] There is an independent contract between the building owner and the architect, apart from the building contract, and upon that the plaintiff in this case is suing for his fees; the defendant may have a right to counter-claim for negligence under that contract, though under the building contract the plaintiff may be in the position of arbitrator.

Scott Fox, K.C., and *R. W. Harper*, for the plaintiff. The authorities shew that the architect under a contract like that in the present case is in the position of an arbitrator or quasi arbitrator when giving a certificate, and therefore is not liable to an action for negligence in performing his functions as such. The cases of *Pappa* v. *Rose* (4), *Tharsis Sulphur Co.* v. *Loftus* (5), and *Stevenson* v. *Watson* (1) are authorities to the effect that, wherever a person is invested by other persons with the function of deciding any matter between them impartially, i.e., in a judicial manner, he is in the position of an arbitrator for this purpose. It is not necessary, in order to constitute a person an arbitrator for the present purpose, that there should have been an express dispute. There is a dispute by implication or an anticipation of the probability of dispute, wherever two parties ask a third to fix as between them what one is to pay the other, or to settle any other such matter between them.

(1) (1879) 4 C. P. D. 148.
(2) (1880) 2 Hudson on Building Contracts, 207, at p. 214.
(3) (1871) L. R. 6 Q. B. 332.
(4) L. R. 7 C. P. 32; L. R. 7 C. P. 525.
(5) L. R. 8 C. P. 1.

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It is enough that they cannot agree or have not agreed on the matter, without any express dispute having been formulated.

Bray, K.C., and *Morten*, for the plaintiffs in the second case. An arbitrator is a person appointed to settle a dispute which has arisen. Where a person is appointed to ascertain some matter between parties to prevent disputes arising, not to settle them when they have arisen, such a person is not in the position of an arbitrator, but of a valuer: see *In re Carus-Wilson and Greene*. (1) In cases such as this it does not necessarily follow from the fact that the contract provides for a certificate by the architect that there need be any dispute between the parties to the building contract. The building owner might be quite satisfied with the builder's charges, and pay them without the necessity for any such certificate. The case is not one of a dispute referred to arbitration, but of a person being employed by a building owner as an expert for reward to safeguard his interests and check the builder's accounts in respect of matters of which the building owner cannot himself judge. *Wadsworth* v. *Smith* (2) is a very strong authority in the plaintiffs' favour.

[COLLINS L.J. The question in that case was not whether the architect was in the position of an arbitrator for the present purpose, but whether there was a submission to arbitration within the meaning of the Common Law Procedure Act, 1854, which could be made a rule of Court.]

[They also cited *Jenkins* v. *Betham* (3); *Scott* v. *Liverpool Corporation* (4); *McIntosh* v. *Great Western Ry. Co.* (5)]

L. Horton-Smith, for the defendant. The authorities tend to shew that, though a case may not be one of a submission to arbitration in the strict sense of the term applicable under the Common Law Procedure Act, 1854, or the Arbitration Act, 1889, yet it may be one of arbitration for the purposes of the doctrine that an arbitrator is not liable to an action for negligence. In this case a right of appeal to arbitration is given by the contract under clause 22 to either party. The

(1) (1886) 18 Q. B. D. 7.
(2) L. R. 6 Q. B. 332.
(3) (1854) 15 C. B. 168.
(4) (1858) 28 L. J. (Ch.) 230.
(5) (1848) 2 De G. & Sm. 758; (1850) 2 Mac. & G. 74.

mere fact that the architect is paid by the building owner as his agent in respect of a portion of his duties as architect, such as the preparation of plans and the supervision of the work, does not shew that he is not an arbitrator in ascertaining and certifying the amount due to the contractor. The same element existed in *Pappa* v. *Rose*. (1) In *Rogers* v. *James* (2) the question does not seem really to have been whether the defendant could be sued for negligence in giving a certificate. The action was for negligence in not properly supervising the work, in consequence of which the work was defective. The judgment would appear to have proceeded on the ground that the action against the defendant was for negligence in the performance of that part of his duties in which he was merely acting as the plaintiff's agent.

A. L. SMITH M.R. I will deal first with the first of the two appeals. In this case the plaintiff, an architect, brought an action against the defendant for commission payable to the plaintiff for work done by him for the defendant in relation to a contract for the erection of certain houses, which had been built for the defendant; and the defendant counter-claimed against the plaintiff on the ground that he had been guilty of negligence in ascertaining and certifying the amount payable by the defendant to the contractor for the erection of the houses, whereby the defendant had sustained damage. The question raised is whether, in ascertaining and certifying the amount payable by the defendant to the contractor, the plaintiff was in the position of an arbitrator between the building owner and the contractor, or merely in the position of an agent for the building owner. If he were merely in the latter position, he would clearly be liable for negligence; but, if he were in the position of an arbitrator, then, beyond all doubt, the building owner could not sue him for negligence, for in that case he would only be liable to an action on the ground of fraud or collusion. There is no suggestion of any such cause of action here, and the only question is whether the plaintiff is liable for negligence.

(1) L. R. 7 C. P. 32, 525. (2) 8 Times L. R. 67.

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I have no doubt that, under many clauses of the building contract in this case, the plaintiff acted merely as the agent for the defendant, the building owner, for the purpose of seeing that the builder did his work properly, and used proper materials. As regards matters in which the plaintiff was employed merely as agent for the building owner, he was to protect his interests adversely to the builder, and the plaintiff would be liable to an action by his employer, if he acted negligently in such matters. But the question in the present case depends on his position under clause 20 of the building contract, by which the building owner and the contractor contract to be bound by the final certificate of the architect, and under which clause, when the architect acted, in my judgment he was to act impartially towards the building owner and the contractor, and this was his duty to both. The question is whether under this clause he acted solely as the agent for the building owner, to protect his interests as against the builder, or as an arbitrator between the building owner and the builder.

Under clause 20, I cannot come to the conclusion that the architect's sole duty was to protect the interests of the building owner against the builder. I think that under that clause he owed a duty to the builder as well as to the building owner. I think that the effect of his agreeing to act under clause 20 of the contract was that he undertook the duty towards both parties of holding the scales even and deciding between them impartially as to the amount payable by the one to the other. I cannot think, as suggested by the defendant's counsel, that the plaintiff's duty was only to protect the interests of the building owner, in other words to cause the building owner to pay to the builder as little as possible for his work. With regard to the effect of clause 22 of the contract in this case, I confess that, notwithstanding what was said by Grove J. in *Clemence* v. *Clarke* (1), I do not see why, in case of a dispute arising under the contract, either party should not be entitled to go to arbitration under that clause. Under clause 22 of the contract in the second case with which we have to deal, it

(1) 2 Hudson on Building Contracts, 207.

seems clear that either party would, in the case of a dispute, be entitled to have it referred to arbitration. But I do not think that point is really material to the question which we have to decide. The cases of *Lloyd Brothers* v. *Milward* (1) and *Clemence* v. *Clark* (2), to which we have been referred, in my opinion lead to the conclusion that, unless there is a dispute, and a reference under clause 22, before the architect certifies, the certificate of the architect with regard to the amount which the building owner has to pay the builder under clause 20 is final. The ascertainment of the amount to be paid to the builder is not a matter of mere arithmetic, not a merely ministerial or clerkly duty, to use the words of Lord Coleridge C.J. in *Stevenson* v. *Watson* (3), but one involving the exercise of professional knowledge, skill, and judgment. In such circumstances the case of *Stevenson* v. *Watson* (3) appears to shew that the position of a person who, by the agreement of two parties, has to determine what has to be paid by one to the other is that of an arbitrator.

It was argued that there was no dispute between the parties prior to the plaintiff giving his certificate, and that, unless there was a dispute, the plaintiff could not be in the position of an arbitrator. I do not see why there should not be an arbitration to settle matters, as to which, even if there was no actual dispute, there would probably be a dispute unless they were so settled. In the case of *Tharsis Sulphur Co.* v. *Loftus* (4) there was no more a dispute than in the present case. There, a ship having incurred a general average loss, an average adjustment had to be made. There was apparently no actual dispute as to the proportions of the loss to be borne by the parties interested respectively, but those amounts had to be settled, just as in this case it was necessary on the completion of the works to ascertain what was payable by the building owner to the builder, and the matter was therefore put into the hands of an average adjuster. It was held that the average adjuster could not be sued for negligence on the general principle that a person so employed is in the position of an arbitrator, and

(1) 2 Hudson on Building Contracts, 454.
(2) 2 Hudson on Building Contracts, 207.
(3) 4 C. P. D. 148.
(4) L. R. 8 C. P. 1.

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cannot be sued in respect of the manner in which he has exercised his functions, unless he be guilty of fraud or collusion. Bovill C.J. said: "No authority has been cited to shew that a person called upon to act as an arbitrator, or to settle disputes, or adjust accounts between parties, is liable to an action for negligence." Keating J. said: "Now, without deciding what is the proper definition of an arbitrator, it appears to me clear that the defendant is in the position of an arbitrator for the present purpose, inasmuch as he was a person by whose decision two parties having a difference agreed to be bound. It appears to me that the safe rule, when parties agree to be bound by the decision of a third party on any matter, is that they take him in such a case for better or worse; and, if he discharges his duty faithfully and honestly, they must be satisfied." Brett J. said: "Then it is said that the defendant is liable because he was not an arbitrator, but only a person who had undertaken to adjust accounts between two parties. Now the case of *Pappa* v. *Rose* (1) decides that a person who undertakes to give a decision between two parties as to any matter, though he may not be an arbitrator in the strict sense of the word, as not being bound to exercise all the judicial functions for the purpose of deciding the matter in dispute that an arbitrator in the strict sense of the term would have to exercise, nevertheless, is not liable to an action for want of skill. It appears to me that the reasoning employed in that case is equally applicable to an action for want of care, and that, if an arbitrator in the strict sense of the word is not liable for want of care, it follows that a person who has undertaken to decide a dispute between two parties is also not liable." Applying the principle so laid down to the position of the plaintiff under clause 20 of the building contract in the present case, I think that, although the plaintiff may not under that clause have been an arbitrator in the strict sense of the term, yet he was in the position of a person who had to exercise functions of a judicial character as between two parties, and therefore was not liable to an action for negligence in respect of what he did in the exercise of those functions.

(1) L. R. 7 C. P. 32, 525.

I wish to add a few words with regard to the case of *Rogers* v. *James* (1), in which an architect was held liable for negligence in an action by his employer. I think that case is clearly distinguishable from the present. There the architect was sued for negligence in not properly supervising the work under a building contract, which he was employed to supervise by the building owner. No question appears to have been raised in that case as to the position of the architect being that of an arbitrator. It was simply a case in which he was held liable for negligence in the performance of a duty which he owed to his employer and to him alone in respect of a matter in which he was acting solely as agent for the building owner. The decision in that case has in my opinion no bearing on the present case. For these reasons I think that the counter-claim of the defendant was not maintainable, and that the appeal should be dismissed.

The second case with which we have to deal was one in which an architect was sued by a building owner for negligence of the same character as that alleged in the first case, namely, in ascertaining and certifying for the amount due from a building owner to the builder. For the reasons which I have already given in the first case, I think the action is not maintainable. There may be some slight differences in the circumstances of the two cases, but I do not think that they make any distinction between the two cases in point of principle. The facts appear to me to shew that the defendant in the second case was also in the position of an arbitrator, and therefore that the action would not lie. The appeal in that case must also be dismissed.

COLLINS L.J. I am of the same opinion. The same question arises in both of these appeals. That question is whether an architect placed in the position occupied by the plaintiff in the first of the appeals, and by the defendant in the second, is what has been described in some of the cases on this subject as a quasi arbitrator. If he is, then the result of the authorities appears to me to be that an action is not maintainable

(1) 8 Times L. R. 67.

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against him for negligence in the exercise of his functions. The question whether he was in that position appears to me to depend upon whether, to use the words of Channell J. in the Divisional Court, he was placed in a position in which he was bound to exercise his judgment impartially as between the two parties to the building contract. It was argued that he was not placed in that position, but was to act only as agent for the building owner, and that, as such agent, he owed no duty to the builder to act carefully and impartially. The question is whether that view, or the view that he was bound to exercise his judgment impartially between the parties, is the right view of his position. In my opinion, when the effect of the building contract is understood, it becomes clear that the position of the architect is that of a quasi arbitrator. The effect of clause 22 of the contract has been made the subject of decision in this Court in *Lloyd Brothers* v. *Milward* (1), and we are not at liberty, even if we were disposed to do so, to search for other constructions of it. It was there held that the effect of that clause was that, where a dispute had arisen, by which I think was meant that a dispute had been actually formulated between the parties, before the architect had given his certificate, the jurisdiction of the architect was ousted, and the jurisdiction of the referee was let in; but that, where no such formulated dispute had arisen before the architect's certificate was given, the jurisdiction of the referee was not let in, and the decision of the architect was final, and stood in the same category as the award of a referee would do, as conclusive evidence that the works had been completed, and that the builder was entitled to the balance for which the certificate was given. What, then, is the position of an architect, who, under a contract such as that here in question, has to give a certificate, which is to be final and binding, not only on his employer, but also on the other party to the contract? Can he address himself to his duty in the matter of giving that certificate free from any obligation towards that other party, or is he placed in a position in which it is his duty to exercise his judgment impartially as between

(1) 2 Hudson on Building Contracts, 454.

the parties to the contract? It appears to me that he is placed in the last-mentioned position. That being so, the case seems to come exactly within the law as laid down in *Stevenson* v. *Watson*. (1) I have always looked on that case as the leading case on the subject with which we are dealing. It followed a series of decisions as to the position of a lay person who has to decide a dispute between two parties. Lord Coleridge C.J., after reviewing the authorities, laid down the law as being that, where a matter is left by two parties to the judgment of a third, who is to determine their rights, and the task of so doing is not a mere matter of arithmetic, but involves skill and knowledge, he is in the position of a quasi arbitrator, and no action will lie against him for what he does in the exercise of his functions as such, except in the case of fraud or collusion. In that case the question arose on demurrer, and the material clause of the contract is set out in the statement of claim as follows: "The contractor and the directors will be bound to leave all questions or matters of dispute which may arise during the progress of the works or in the settlement of the account to the architect, whose decisions shall be final and binding upon all parties: the contractor will be paid on the certificate of the architect." It seems to me that this latter provision is substantially the same as that contained in clause 20 in the present case. There was no formulated dispute in that case any more than in the present case, but the effect of the contract was that the certificate of the architect was final, and a condition precedent to the ascertainment of the rights of the parties. The builder sent in to the defendant accounts shewing a balance, after giving credit for certain sums, of 1616*l.* 6*s.* 7*d.*; and it was alleged that the defendant, without calling upon the plaintiff for any explanation of the accounts, and without any communication with him on the subject thereof, proceeded to ascertain what in his judgment was payable, and gave a certificate to the effect that a balance of 251*l.* 14*s.* 4*d.* was due. There was, therefore, no more a formulated dispute between the parties than in the present case. Lord Coleridge C.J., in giving judgment, after dealing with the suggestion that the

(1) 4 C. P. D. 148.

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defendant was to make a mere valuation or estimate of a merely arithmetical character, and having come to the conclusion that the duty of the architect in the matter involved skill and professional knowledge, went on to say: "Moreover, it seems to me that it is so provided for by the contract, and that the true view of the contract is that presented by Mr. Wills, namely, that before the plaintiff can recover sums of money from the building owner, there must be the certificate of the architect to ascertain what sums are due from the building owner to the plaintiff. Now, if I have rightly described the position of the defendant with respect to the plaintiff, it follows from the decided cases that this action does not lie." He then says that there is authority for saying that, in the case of fraud or collusion by the architect, an action against him would lie; and afterwards proceeds as follows: "I think this case is within the authority of the cases cited which decide that, where the exercise of judgment or opinion on the part of a third person is necessary between two persons, such as a buyer and seller, and, in the opinion of the seller, that judgment has been exercised wrongly, or improperly, or ignorantly, or negligently, an action will not lie against the person put in that position, when such judgment has been wrongly, or improperly, or ignorantly, or negligently exercised." It was argued that there could be no quasi arbitration, unless there had been a dispute: but I think that there is a fallacy involved in that argument. There is a difference between a dispute formulated between the parties, so as to come within the purview of clause 22 of the contract as interpreted by this Court in *Lloyd Brothers* v. *Milward* (1), and that sort of possible difference which underlies an agreement by two parties that what one is to pay and the other has a right to be paid in respect of a certain matter shall be ascertained by a third person. There is involved in such an agreement an underlying assertion of possible difference as to the right to be so ascertained by the third person, and the person who, on notice of such an agreement, accepts the responsibility of deciding the matter between the parties must in my opinion have duties to both of them. It is not, I think,

(1) 2 Hudson on Building Contracts, 454.

necessary that there should be a formulated dispute, in order to clothe such a person with the duties, and confer on him the immunities, of a quasi arbitrator.

Then is the architect in these cases in that position? When the parties have not by their acts brought clause 22 of the contract into operation, I think the architect stands in his original position of a quasi arbitrator, i.e., of a person whose duty it is to ascertain impartially the rights and liabilities of two persons as between them, not by mere arithmetical calculations but by the exercise of skill and judgment. The case seems to me to come well within the principle laid down in *Pappa* v. *Rose* (1), *Tharsis Sulphur Co.* v. *Loftus* (2), and *Stevenson* v. *Watson.* (3) Not only does it appear to me to come within the principle laid down in those authorities, but, in my opinion, there is clear authority with regard to the terms of this very contract. As I have said, there is the decision in *Lloyd Brothers* v. *Milward* (4), where, there having been a formulated dispute within clause 22, the jurisdiction of the architect was ousted; and there is also in support of the view which I am taking the case of *Clemence* v. *Clarke* (5), where it was held that, there having been no such formulated dispute, the certificate of the architect was final, and it was spoken of by Grove J. as an award. Taking those cases together, I think it is clearly established that the architect, his functions not being ousted under clause 22, was, as in ordinary building cases, a person clothed with the duty of exercising an impartial judgment. I agree with the reasoning of the Master of the Rolls and of Channell J. in the Court below. With regard to the case of *Wadsworth* v. *Smith* (6), which was relied on by the appellant, I think it is open to the distinction which I pointed out when it was cited. The question there was whether a building contract, providing that the architect's certificate was to be final between the parties as to certain matters, was a submission to arbitration within the Common Law Procedure Act, so as to admit of being made a rule of Court; and it was

(1) L. R. 7 C. P. 32, 525.
(2) L. R. 8 C. P. 1.
(3) 4 C. P. D. 148.
(4) 2 Hudson on Building Contracts, 454.
(5) 2 Hudson on Building Contracts, 207.
(6) L. R. 6 Q. B. 332.

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to this point that the observations in the case were addressed. If such a contract were a submission, the architect would be in the full sense of the term an arbitrator. This is, presumably, the reason why in the subsequent cases the Courts have been careful to refer to persons similarly situated as "quasi arbitrators," that is persons not acting under a formal submission, but, nevertheless, for certain purposes regarded as being in the same position as arbitrators.

I see no material distinction between the facts in the second appeal and those in the first. It may be observed that in the second case the judgment was given by Mathew J., who tried the case of *Rogers* v. *James* (1), where it was held that the action for negligence was maintainable against the architect. No one disputes that for many purposes the architect is the agent of the building owner, and would therefore be liable to an action for negligence, but it is not inconsistent with that proposition that for some purposes he should assume the rôle of a quasi arbitrator, in which case an action will not lie against him for negligence. In *Rogers* v. *James* (1) the architect was apparently not acting in that capacity, but as agent for his employer.

ROMER L.J. I regret to say that I differ from the Master of the Rolls and my brother Collins in this case. I will first state my view as to the principle which, in my opinion, applies to a case of this kind. Suppose a person undertakes for reward to value or estimate for another work about to be done for his principal by a third person; in my opinion, he does not, so far as his principal is concerned, become in the position of an arbitrator in regard to his valuation or estimate, merely because he knows that his principal and the third person have by contract between them agreed that, in default of dispute previously arising with regard to the matter, his valuation or estimate is to be taken as conclusive, and as determining the price to be paid by his principal for the work to be done by the third person. In such a case, in giving his valuation or estimate, he would still be acting for his principal, and, so long as he acted

(1) 8 Times L. R. 67.

without fraud, he would be under no obligation or liability to the third person, and, acting as he would do for his principal, if he was guilty of negligence, causing damage, would be liable to his principal in an action. I cannot bring myself to think that that view is wrong, and yet, undoubtedly, the contrary view must be maintained by the architect in the present case to enable him to succeed on this appeal; for, on the facts, it appears to me clear that, by the terms of his employment by the defendant, he undertook to measure up from time to time the work to be done for his principal by the contractor, and to certify the amount in money the work represented, and in particular on completion of the work to certify the balance payable. For this work he was to be paid by his principal, and it is in respect of it that he is suing. It would follow that, if in doing that work, for which he was to be paid by his principal, he was guilty of negligence from which damage ensued to his principal, he would be primâ facie liable. To enable him to escape from that liability, the onus would lie on him to shew that, by the terms of the contract between his principal and the contractor, he was freed from that primâ facie liability. No doubt he might do so, if he could shew that by those terms he was undoubtedly placed in the position of an arbitrator with regard to his certificates, and that the principal's complaint against him in regard to the certificates was for something done in his capacity of arbitrator. But he would not, in my opinion, succeed in shewing this merely by reason of the fact that his principal and the contractor had by the contract agreed that, if no prior dispute arose in reference thereto, his certificates should be treated as conclusive between them.

I turn then to the contract in this case, and what do I find? Not only is there nothing in the contract going beyond what I have last mentioned, or indicating that, in measuring up the work, and certifying, he was regarded or treated as an arbitrator, but the provisions of the contract appear to me to negative the idea that under the contract he was regarded as or placed in the position of an arbitrator. I need not go through the whole of those provisions, but I may point out that there is an arbitration clause (clause 22) which does provide for

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settlement of disputes by an arbitrator, who is not the architect, and that in that clause the architect is clearly recognised as the agent of the building owner; as a person who, in reference to what he had to do, was considered as acting for his principal, and as one opposed to the contractor. Clause 8 is not without significance. If there were any matters in respect to which one would expect to find the architect placed in the position of an arbitrator, if he was ever intended to occupy that position, it would be in reference to the matters dealt with by that clause; and yet we find that, though the architect's principal would be bound under clause 20 by the architect's certificate in reference to those matters, yet under clause 22 the contractor may challenge the certificate, and go to arbitration upon it. I will refer also to clauses 10 and 11, because those are clauses under which the decision of the architect is final, and there is no right of going to arbitration under clause 22. They are clauses which enable the architect to decide during the progress of the works whether proper materials are being used by the contractor, and any appeal from his decision on that subject is expressly excluded from clause 22. Can it be that, because under those clauses he is given power to decide between the parties whether the materials were sufficient, if through negligence he allowed improper materials to be used, and his employer, the building owner, were seriously damaged thereby, the latter would have no remedy against him, and he could say by way of defence to any action that he was an arbitrator? I think that would be a most lamentable conclusion, and one which, in my opinion, we are not bound to arrive at, and yet, if the argument for the architect be correct, I think it must follow that in such a case the building owner would have no remedy. I think, if the contract is looked at as a whole, and if the clauses to which I have referred, and others to which reference might be made, are examined, far from enabling the architect to discharge the onus which I have mentioned as resting upon him, the contract tends strongly to negative the contention on his behalf. To hold the opposite view to that which I am expressing appears to me to be putting a construction on the contract which is not necessary or right, and which

would work injustice as between the building owner and an architect guilty of negligence.

The state of the authorities on the subject is not altogether satisfactory. But, as they stand, there is nothing in my opinion to prevent me from arriving at the conclusion which, for the reasons which I have given, appears to me more consonant with the good sense of the matter and justice between the parties: on the contrary, I think that there is strong authority to support that conclusion. The general question of principle had to be considered in *Wadsworth* v. *Smith* (1) by Cockburn C.J., Blackburn J., Mellor J., and Hannen J. They had in that case to consider whether, under a clause in a building contract, an architect was constituted an arbitrator as to certain matters. The clause was a somewhat ambiguous one, more so than that in the present case, but they dealt with the matter as one of general principle; and, so dealing with it, came to the conclusion that the clause did not make the architect an arbitrator. Cockburn C.J. said in g ving judgment: "Here the clause in question gives the defendant power to put an end to the agreement, if there is unreasonable delay or unsatisfactory conduct on the part of the plaintiff, such delay or unsatisfactory conduct to be ascertained and decided in writing by Messrs. Scargill and Clarke, the defendant's architects for the time being, against whose decision there shall be no appeal. I am by no means disposed to say that this amounts to a submission to arbitration, although it is certainly wider and different from many of the ordinary clauses as to the certificate of architects which have occurred in cases under building contracts, and which have been determined to be binding on the builder, and not to be clauses of arbitration. The present clause is certainly more like a submission to arbitration; it is on the confines of the two classes; but on the whole it seems to me to savour more of a mere architect's certificate than of a judicial proceeding." He was dealing there with the question of principle, and considering in relation to it the ordinary clause in a building contract by which the certificate of an architect is made binding on the parties, and he says that under such a clause the

(1) L. R. 6 Q. B. 332.

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architect is not an arbitrator. Blackburn J. said: "Where by an agreement the right of one of the parties to have or do a particular thing is made to depend on the determination of a third person, that is not a submission to arbitration, nor is the determination an award; but, where there is an agreement that any dispute about a particular thing shall be inquired of and determined by a person named, that may amount to a submission to arbitration, and the determination, though in the form of a certificate, be an award." He appears to me to be there dealing with the matter on the principle which I have endeavoured to express as that which ought to govern this case. Mellor J. concurred. Hannen J. said: "I think this is not an agreement or submission to arbitration: the clause in question seems to me no more than an extension of the ordinary clause in building contracts, that the certificate of the architect shall be conclusive as to work done, and the mode of doing it." It seems to me that those four learned judges all dealt with the question in accordance with the view which I am expressing. The case of *Jenkins* v. *Betham* (1) seems to me, when examined, to be an authority in favour of the view which I am taking. There an action was brought against persons whom the plaintiff had appointed as valuers for him to value dilapidations as between him and another person. It was agreed in that case that, if the valuers disagreed, an umpire should be appointed, but it is to be observed that, if no umpire were appointed, and the valuers agreed, their valuation was to be final and conclusive as between the parties. If the view put forward by the respondents in this Court were correct, it ought to have been held in that case that no action would lie against the valuers; but it was held that the action would lie, because the valuers had undertaken to employ due skill with reference to the matters which they were employed to value. That case appears to me to be an authority which supports the view I take. I also think that the reasoning of the judges in *Rogers* v. *James* (2), and also in *Lloyd Brothers* v. *Milward* (3), is rather in favour of that view than of the opposite view. I will now

(1) 15 C. B. 168. (2) 8 Times L. R. 67.
(3) 2 Hudson on Building Contracts, 454.

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say a word or two with reference to the authorities which are said to conflict with the view I take. I will take first the case of *Tharsis Sulphur Co.* v. *Loftus*. (1) There the question was whether the defendant had or had not been in the position of an arbitrator in reference to the performance of the duties of an average adjuster. To my mind the head-note is correct which says that, general average losses having been incurred, it became necessary to settle the proportion of the loss which the ship and cargo respectively had to bear, and "in order to do so, the plaintiffs, the owners of the cargo, and the shipowner agreed to refer the matter to the defendant, an average adjuster, and to be bound by his decision." In my view it was a case in which there was a dispute, and the parties to that dispute agreed that the defendant should settle it between them; at any rate, the Court treated it on that footing: and therefore the defendant was clearly in the position of an arbitrator. The defendant was not employed by one party more than the other. I should have thought that, if ever there was a case in which a person was in the position of an arbitrator, that was the case. That the judgment proceeded on the footing that there had been a dispute is shewn by what Bovill C.J. said during the argument. He said: "The nature of the agreement set out assumes that the amount was in question between the parties." Looked at in that point of view, the case appears to me to have been rightly decided, and not to be in conflict with the view I am taking. In *Pappa* v. *Rose* (2) a broker was held to have been in the position of an arbitrator. The question which he there had to determine was whether certain raisins, which had to be delivered under a contract, were of fair average quality; and the Court came to the conclusion that under the circumstances the broker was an arbitrator, and therefore the action would not lie. I think the reason for their so holding is shewn by the observations of the judges. At the trial Bovill C.J. held that the action would not lie because the defendant acted as a judge or arbitrator in deciding on the quality of the raisins. In other words, there had been a question as to the quality of the raisins, and the defendant

(1) L. R. 8 C. P. 1. (2) L. R. 7 C. P. 32, 525.

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had been put in the position of a person who was to decide that question as between the two parties, and therefore was for that purpose in the position of an arbitrator not employed as the agent of one or the other. Neither had to remunerate him for so deciding as an agent. Keating J. said in the Court of Common Pleas: "I think this was not a matter to be done by the defendant in his ordinary capacity as a broker. It is true that he was a broker, and that he made the contract. But he was only to decide upon the quality of the raisins in the event of a dispute arising between the parties." Brett J. said that the ruling was that "he was a person filling a position which brought him within an exception well known to the law of England, namely, that a person who is appointed and is acting as an arbitrator to determine a matter in difference between two or more persons does not enter into an implied promise to bring to the performance of the duty entrusted to him a due and reasonable amount of skill and knowledge": so that he clearly was of opinion that the case was one in which the broker had to settle a dispute. That case does not seem to me to be any authority against the view which I have expressed. The only case as to which I feel any difficulty is *Stevenson* v. *Watson*. (1) I cannot help thinking that in that case the Court was greatly influenced by the very special nature of the clause which was contained in the contract. The case arose on demurrer, and the clause is set out in the statement of claim. It was as follows: "The contractor and the directors will be bound to leave all questions or matters of dispute which may arise during the progress of the works or in the settlement of the account to the architect, whose decisions shall be final and binding upon all parties." I am not surprised that upon that clause the Court should have held the view that the architect was constituted an arbitrator. If the decision did not proceed upon that clause, but was intended to lay down any general principle, which I do not think to be the case, for I do not think that the Court meant to differ from what was said in *Wadsworth* v. *Smith* (2), all I can say is that I prefer the decision in that case, and must respectfully differ from the view

(1) 4 C. P. D. 148. (2) L. R. 6 Q. B. 332.

expressed in *Stevenson* v. *Watson*. (1) I do not think, however, that it is necessary to go the length of saying that the Court in *Stevenson* v. *Watson* (1) did differ from the decision in *Wadsworth* v. *Smith*. (2) I think that their decision was based upon the special terms of the contract in that case. It may also be observed that it was not really necessary to decide the point now in question in *Stevenson* v. *Watson*. (1) The contractor was suing in that case, and it was necessary for him to put his claim on the ground that the defendant was an arbitrator; he could not put it in any other way; for, if the defendant was not an arbitrator, he certainly was not the agent of the contractor. Therefore the Court had not really, in coming to the conclusion which they arrived at, to decide whether the defendant was an arbitrator or not; for, if he was not, the defendant, not being the agent of the plaintiff, was under no duty or obligation to him, beyond that of acting honestly. I think, looking at all the authorities, the balance of authority is in favour of the view which I am expressing. I think also, as I have said, that that view is more in consonance with natural justice. I think it would be lamentable that in cases of this kind an employer, who pays an architect for supervising work and who has sustained damage by his negligence in the performance of the duties for which he is paid, should have no remedy against him. Therefore I think that the appeal ought to be allowed in the first of the two cases. The view which I have expressed as to the first case also applies to the second case.

Appeals dismissed.

Solicitors for plaintiff in the first appeal: *Van Sandau & Co., for Mills & Co., Huddersfield.*

Solicitors for defendant in the first appeal: *James & Mellor, for Learoyd & Co., Huddersfield.*

Solicitors for plaintiff in the second appeal: *James White & Leonard.*

Solicitors for defendant in the second appeal: *J. A. P. Ingoldby, for Nye & Clewer, Brighton.*

(1) 4 C. P. D. 148. (2) L. R. 6 Q. B. 332.

E. L.

1900
Dec. 18.

BURTON *v.* VESTRY OF ST. GILES-IN-THE-FIELDS AND ST. GEORGE, BLOOMSBURY.

Poor-rate—Procedure—Appeal against Valuation List—Removal of Appellant's Name from List—Alteration of Assessment—Recovery of Rates paid pending Appeal—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67), *s.* 44.

By s. 44 of the Valuation (Metropolis) Act, 1869, where in consequence of the decision on any appeal under the Act to assessment sessions or a superior Court an alteration in the valuation list is made which alters the amount of the assessment, contribution, rate, or tax levied thereunder, the difference, if too much has been paid, is to be repaid or allowed.

Upon a case stated by quarter sessions on an appeal by the plaintiff against a valuation list, the Court held that the plaintiff was not the rateable occupier of the premises, and was not liable to be rated in respect thereof. The vestry performing the duties of overseers having refused to repay to the plaintiff the amount of certain rates levied by them under the valuation list, and paid by him during the pendency of the appeal proceedings, the plaintiff brought an action against them to recover the sums so paid:—

Held, that, although the effect of the appeal had been to strike the plaintiff's name altogether out of the valuation list, there had nevertheless been an alteration in the valuation list which altered the amount of the assessment, contribution, rate, or tax levied thereunder within the meaning of the section, and that the plaintiff was entitled to recover.

Action tried without pleadings before Mathew J.

The writ was specially indorsed with a claim for repayment by the defendants of sums amounting to 92*l.* 6*s.* 4*d.* paid by the plaintiff in respect of rates, the plaintiff alleging that he was entitled to the repayment by reason of an alteration in the supplemental valuation list for the parish of St. George, Bloomsbury, in consequence of an appeal against the list. The facts were admitted, and were shortly as follows.

The plaintiff carried on business as an advertisement contractor under the style of Partington & Co., and the defendants were by virtue of statutory powers contained in a private Act (1) the overseers for the united parishes of St. Giles-in-the-Fields and St. George, Bloomsbury. During the carrying out of certain building operations in Southampton Row the plaintiff had, under licences from the builders, pasted advertisements

(1) 11 Geo. 4, c. x.

on the exterior hoardings surrounding the premises. In June, 1897, the name of the plaintiff was inserted in a provisional valuation list for the parish of St. George, Bloomsbury, as the rateable occupier of the advertising stations or hoardings, and his name was in due course placed in the supplemental valuation list for the parish. The plaintiff objected to the supplemental valuation list on the ground that he was not the occupier of the premises, claiming that his name should be struck out of the list altogether. No objection was taken by him to the amount of the valuation. In June, 1898, the assessment committee heard the objection, but refused to give the plaintiff the relief claimed, and confirmed the valuation list. The plaintiff appealed to quarter sessions under the provisions of the Valuation (Metropolis) Act, 1869, and the Local Government Act, 1888, but in February, 1899, the appeal was dismissed subject to a case for the opinion of the High Court. Upon the argument of the special case the Court (Grantham and Channell JJ.) held that the plaintiff was not the rateable occupier of the premises, and allowed his appeal. (1) The case accordingly went back to quarter sessions, who entered judgment in conformity with the decision of the High Court, and ordered the name of the plaintiff as the occupier of the premises to be struck out of the valuation list; it was admitted, however, that the name had not in fact been struck out in pursuance of the order. During the years 1897 and 1898 the plaintiff had paid to the defendants' collector in respect of rates six sums of money, amounting in all to 92*l.* 6*s.* 4*d.*, which had admittedly been received by the defendants; two of these sums had been paid by the plaintiff after the issue of summonses to enforce payment of the rates but before the summonses became returnable. The defendants declined to repay these sums to the plaintiff, on the ground that there had been no such alteration in the valuation list as was contemplated by s. 44 of the Valuation (Metropolis) Act, 1869. (2) The present action was then brought.

(1) See *Burton* v. *St. Giles' and St. George's Assessment Committee*, [1900] 1 Q. B. 389.

(2) By 32 & 33 Vict. c. 67 (The Valuation (Metropolis) Act, 1869), s. 44, "Notwithstanding any appeal

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R. Cunningham Glen (*Bethune* with him), for the plaintiff. There has been an alteration in the valuation list altering the amount of the assessment, contribution, rate or tax, within the meaning of s. 44 of the Valuation (Metropolis) Act, 1869. It is immaterial that the alteration has not in fact been made in the valuation list; the fact that it has been ordered by the court of quarter sessions to be made is sufficient to bring the case within the section.

[He was stopped by the Court.]

Macmorran, Q.C. (*Ryde* with him), for the defendants. It is not contended that the omission to alter the valuation list in fact after its alteration had been ordered affords a defence to the action. But the plaintiff has mistaken his remedy. If the plaintiff's objection was that he was not the rateable occupier, he should have refused to pay, when the defence would have been properly raised before the magistrate upon a summons to enforce the rate. The valuation list is conclusive as to value and amount only, and not as to the person liable to be rated as occupier; the appeal was therefore futile, being in respect of a matter as to which the valuation list was not conclusive. There never was any question or appeal as to the amount of the valuation, and the only result of the appeal has been to give effect to the decision of the High Court that the plaintiff was not the rateable occupier. There has been no alteration in the valuation list within the meaning of s. 44; that section applies only where an alteration is made in the amount appearing in the valuation list, and is inapplicable to the case of a

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under this Act which may be pending at the commencement of the year, the valuation list shall come into force unaltered, and every assessment, contribution, rate, and tax in respect of which the valuation list is conclusive shall be made, required, levied, and paid in accordance with such valuation list; and where in consequence of the decision on any appeal under this Act to assessment sessions or a superior Court an alteration in such valuation list is made which alters the amount of the assessment, contribution, rate, or tax levied thereunder, the difference, if too much has been paid, shall be repaid or allowed, and if too little, shall be deemed to be arrears of the assessment, contribution, rate, or tax (except so far as any penalty is incurred on account of arrears), and shall be paid and recovered accordingly."

name being struck out of the list altogether; it enables the excess to be recovered where the amount of the valuation has been too high, but does not give any right of requiring repayment to a person whose name should never have been in the list at all; in such a case the person assessed should refuse to pay. A rate imposed on persons in respect of land which they do not occupy is a rate which overseers have no power to make, nor magistrates to enforce: *Bristol (Governors of Poor of)* v. *Wait.* (1) The defendants, as overseers, are mere conduit-pipes to collect the amount of the various precepts; they have paid the money over and have no means of getting it back. The two sums which were paid under the compulsion of legal process are at any rate not recoverable. [He also cited *Manchester Overseers* v. *Headlam.* (2)]

R. Cunningham Glen, in reply. It is admitted that the defence that a person is not the rateable occupier may be raised before the magistrates, but it may also be raised before quarter sessions; it is not necessary that an objection to value should be taken before quarter sessions and the objection on the ground of non-occupation before the magistrates; they may both be raised before the one tribunal of quarter sessions. The defendants have failed to shew that the defence of non-occupation cannot be taken at quarter sessions upon an appeal against the valuation list. The alteration in the present case is an alteration of the amount of the assessment within the meaning of s. 44; a striking out of the whole amount must be an alteration of the amount appearing in the valuation list, and the section is not confined to cases where an amount is still left in the valuation list after alteration. The defendants are not mere conduit-pipes; if they were, the provisions of s. 44 as to repayment would be nugatory even in cases where the alteration did not go to the whole of the assessment.

MATHEW J. I am of opinion that s. 44 applies to the claim in the present case. It has been argued on behalf of the defendants that the appeal contemplated by s. 44 is not an appeal on the ground that the appellant was not the occupier,

(1) (1834) 1 A. & E. 264, 281. (2) (1888) 21 Q. B. D. 96.

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and that any such objection must be dealt with differently and as a defence upon an application made to the justices to enforce the payment of rates. If the earlier words of the section stood alone, there would be something to be said in favour of the contention; for the section begins "Notwithstanding any appeal under this Act," and the appeal under the Act seems to be an appeal against the valuation list. But the section goes on to say that where in consequence of the decision in any appeal under this Act to assessment sessions or to the superior Court an alteration in the valuation is made the amount shall be repaid. What happened in the present case was that there was an appeal to quarter sessions, a legitimate appeal on the ground that the plaintiff was not the occupier; the court of quarter sessions gave judgment upon that point subject to a case, and on the case coming before the Divisional Court it was held that the plaintiff was not liable. That being so, the only question is whether the fact that he is held liable to no part of the rate is an alteration within the meaning of the section.

The objection was taken on behalf of the defendants that in this case the money had been received by the vestry and paid away, and that therefore it would be extremely hard, or contrary to law, that they should be compelled to repay the money which they were the mere agents to hand over—the mere conduit-pipes, as they were called. But that argument would strike away the whole of the section, because in the case to which it is suggested that its operation is confined, that is where there is an alteration in the amount not going to the whole rate, the same argument might be urged, namely, that the vestry are merely conduit-pipes and have paid the money away, and therefore ought not to be called upon to repay it. The Act of Parliament has provided for the very case, for there is a provision that where an alteration is made the money shall be repaid. I assume that effect will be given to the Act of Parliament without saying anything about the course to be taken by the vestry. The question then is reduced to a very narrow one, whether an entire alteration of the rate is an alteration within the meaning of the statute, and I am of opinion

that it is. It follows that the plaintiff is entitled to recover the amount that he has paid. The two rates which were paid under compulsion of law must follow the fate of the others.

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Judgment for the plaintiff.

Solicitors for plaintiff: *J. H. Mote & Son.*
Solicitor for defendants: *H. C. Jones.*

W. J. B.

In re MATEO CLARK. *Ex parte* THE BUENOS AYRES AND PACIFIC RAILWAY COMPANY, LIMITED.

1901 *Jan.* 14.

Bankruptcy — Receiving Order — Composition Scheme — Proof by Secured Creditor for Purpose of Voting admitted—Appeal by Debtor against Admission of Proof—Conditional Withdrawal of Proof refused—Leave to Amend—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *Sched. II., r.* 12.

A creditor claiming to hold security for part of his debt, and who makes a proof for the unsecured balance for the purpose of voting on a composition proposed by the debtor, which proof is admitted for voting by the official receiver, will not, while an appeal against the decision of the official receiver is pending, be allowed to withdraw the proof conditionally; but leave may be given to the creditor to amend the proof by revaluing his security.

THIS was an application by a secured creditor for leave to withdraw his proof under these circumstances.

In the years 1882, 1886, 1888, and 1890 Mateo Clark, the debtor, and his brother J. E. Clark (then in partnership as railway contractors) entered into contracts with the above-named railway company for the construction of certain railway works in Buenos Ayres.

In the year 1896 the railway company commenced an action in the Queen's Bench Division against Mateo Clark and his brother for alleged breaches of the said contracts and claimed 75,000*l.* as damages. This action was still pending.

In August, 1897, a receiving order was made against Mateo

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Clark, but adjudication was stayed, the debtor having proposed a scheme for payment of a composition.

In November, 1897, the railway company lodged a proof for 79,984*l.* 15*s.* 2*d.*, which amount was made up partly of moneys which the railway company alleged they had been compelled to pay in consequence of the failure of the debtor to fulfil certain obligations under the contracts, and partly of the damages claimed in the action; and they valued the securities they held at 2540*l.* This proof was made for the purpose of voting on the scheme, but was not admitted. The scheme, however, was not sanctioned by the Court in consequence of opposition by the railway company.

In May, 1898, an order was made in the action at the instance of the railway company for a commission to go out to Buenos Ayres to obtain evidence and to examine witnesses.

In December, 1898, the debtor submitted another scheme for a composition of 12*s.* in the pound. The official receiver reported in favour of the scheme, but in consequence of the opposition of the railway company it was abortive.

On March 16, 1899, the debtor submitted a further scheme for a composition of 12*s.* in the pound, the amount of the composition to be guaranteed, and the debtor's property to be vested in a trustee. The official receiver reported in favour of this scheme.

On March 27, 1899, the railway company lodged an amended proof of debt, and thereby raised their claim from 79,984*l.* 15*s.* 2*d.* to 92,350*l.* 6*s.* 1*d.*, and re-valued their securities at 9040*l.*; and on March 29 their amended proof was (after disallowing certain items, and deducting the assessed value of the securities) admitted at 4618*l.* 16*s.* 11*d.* by the official receiver for the purposes of voting. Thereupon the debtor at once moved by way of appeal from the official receiver's decision on the ground that the railway company had grossly exaggerated the amount of their claims, and had greatly underestimated the value of their securities, and that there was in fact no unsecured debt in respect of which they were entitled to prove. On this motion coming on for hearing it was, by consent, ordered that the motion should stand over until the return of the

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commission, and that the motion and the action should be heard together, and that the evidence in the action should be evidence in the motion.

The commission had since been returned, and notice of trial given.

The railway company now applied for leave to withdraw their amended proof on the ground that the liability of the debtor had been largely reduced in consequence of certain obligations under the contracts having run off, and that their securities had greatly increased in value.

Reed, Q.C., and *Carrington*, for the railway company. A proof may be withdrawn at any time before it is adjudicated on for dividend: *In re Rhoades*. (1) This proof was made for the purpose of voting only, and since then the securities held by the company have risen in value. At present they are fully secured, and desire to withdraw the proof. There is no authority in the books for refusing a creditor the right to withdraw his claim. The company want to proceed with their action to assess their damages against their securities, and will undertake not to enforce any judgment they may recover in the action against the debtor otherwise than by proof.

[WRIGHT J. You want not to withdraw your proof simpliciter, but to withdraw it subject to a right to put in a different kind of proof?]

Yes, if necessary. The securities, which are mostly shares, may depreciate in value, and the company may again become unsecured. It is not likely, but it may happen, and the company ought not to be deprived of their right under Sched. II., r. 12, of revaluing their securities and proving for dividend.

Muir Mackenzie, for the debtor and the official receiver. The Court is asked not to interfere in any way with the pending proceedings—that is, that the debtor's motion and the action may come on together. The debtor's contention all along has been and is that the company were fully secured, and had no provable debt at the date of their proof. If he succeeds on his motion their proof will be expunged altogether, and his

(1) [1899] 1 Q. B. 905, 909.

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scheme will be carried. If he succeeds in simply reducing the proof he will be able to carry his scheme, and the trustee under the composition will have power to redeem the securities at the value assessed in the proof. But if the proof is now allowed to be withdrawn, the debtor gets no advantage from the assessment of value, and his motion will become abortive. He will be unable to carry the scheme because there will be this outstanding possible claim of the company which would have to be provided for in the composition.

Reed, Q.C., in reply. The company will undertake not to carry in any proof before the scheme is approved; not to oppose the scheme in any way; and to leave it to be determined, when the motion is before the Court at the trial of the action, whether they had a provable debt when they made their proof.

[WRIGHT J. Clearly I should hold the company are entitled to withdraw the proof, provided they abandon their claim altogether on the ground that they never had any right of proof.]

The company cannot do that. Their case is that when they made their proof in 1899 they had a provable debt, but that at present they are fully secured because the securities have risen in value. They are willing that the costs of the motion shall be in the discretion of the Court at the trial of the action, and they will undertake not to apply for adjudication, if the scheme fails, without the leave of the Court.

Muir Mackenzie, for the debtor. Unless the proof is withdrawn absolutely it must be provided for in the composition, and that will wreck the scheme. The debtor is entitled to have this claim disposed of altogether on the ground that there was no provable debt.

Reed, Q.C., for the company. I ask for leave to amend the proof by altering the valuation of the securities.

WRIGHT J. I do not profess to understand what are the real motives that are behind one and perhaps also the other party in this case, but it seems to me that I ought not to establish a precedent for allowing a conditional withdrawal—if

I may so call it—of a proof, as distinguished from an absolute withdrawal of it, whilst there is a motion pending to get rid of the proof. If the company had been willing absolutely and finally to abandon their proof, I cannot say that there could have been any objection to it. But as they are not willing to do that, and as this is a motion pending by the debtor to get rid of the proof altogether, it seems to me that nothing is gained by allowing the withdrawal for the purposes of voting (for that is really what it comes to) of a claim with a reservation that it may be hereafter insisted upon under the scheme or under certain circumstances for the purpose of driving the debtor to an adjudication. I feel great difficulty about doing that, and on the whole I think the best course is to refuse this application for withdrawal, but reserve the costs of it until after the hearing of the debtor's motion, so that I can see whether there was any substance in the present application or not, and give leave to the company now to amend their proof. On the hearing of the motion it will be open to the company on any question to ask the Court to take into consideration in their favour the fact that they made the offer—a qualified offer—to withdraw the proof at the present stage. I do not know whether it will make any difference on the question of costs on the motion, but it may; and the company are not to be prejudiced on the hearing of the motion by anything that has taken place to-day.

Solicitors: *Ashurst, Morris & Co.; Harwood & Stephenson.*

H. L. F.

C. A.
1901
March 1.

[IN THE COURT OF APPEAL.]

STACEY *v.* HILL.

Bankruptcy—Landlord and Tenant—Disclaimer of Lease—Lease determined as between Lessor and Lessee—Surety for Lessee—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 55, *sub-s.* 2.

The defendant had guaranteed the payment of rent which might from time to time be in arrear for twenty-one days under a lease. There had not been any underlease or assignment of the lease. The lessee having become bankrupt, the trustee in bankruptcy disclaimed the lease. The lessor sued the defendant for an amount which he claimed as rent in arrear in respect of a period subsequent to the disclaimer:—

Held, affirming the judgment of Phillimore J., that, the effect of s. 55, sub-s. 2, of the Bankruptcy Act, 1883, being that the lease was determined from the date of the disclaimer as between the lessor and the lessee, the liability of the defendant for rent in futuro was also determined, and therefore the action was not maintainable.

APPEAL from the judgment of Phillimore J. in an action tried by him without a jury.

The action was upon a guarantee.

On November 15, 1898, the plaintiff let to one Chapman the premises, No. 34, High Street, Sheffield, for a term of five years from December 25, 1898, at the yearly rent of 280*l.*, payable quarterly. The defendant gave to the plaintiff a guarantee with regard to payment of the rent in the following terms: "In consideration of your granting the lease of the premises, 34, High Street, Sheffield, to Mr. Thomas Chapman of Hull, I hereby guarantee the payment of so much rent as may be from time to time in arrear for twenty-one days to a sum not exceeding 140*l.*; this guarantee to remain in force concurrently with the lease for a period of five years from the 25th day of December next." On November 3, 1899, a receiving order was made against Chapman. He was subsequently adjudicated bankrupt and a trustee of his estate was appointed. On February 15, 1900, the trustee disclaimed the lease. There had not been any underlease or assignment of the lease. The trustee sent the key of the premises to the

plaintiff's offices, and there was evidence that the plaintiff had advertised them as being to let; but, beyond those facts, there was no evidence that the plaintiff had resumed possession of the premises, and the learned judge found that he had not done so. The defendant paid the quarter's rent due December 25, 1899, and offered to pay 40*l.* 10*s.* as the proportionate part of the next quarter's rent up to February 15, 1900, the date of the disclaimer, but denied any further liability. The action was thereupon brought by the plaintiff to recover a quarter's rent from the defendant. The defendant paid into court the sum of 40*l.* 10*s.*

The learned judge gave judgment for the defendant. (1)

Sylvain Mayer, for the plaintiff. The effect of s. 55, sub-s. 2, of the Bankruptcy Act, 1883, is only that the lease is to be treated as determined so far as concerns the liability of the bankrupt and his property, and of the trustee, but it is not to destroy the liability of a third person, such as the surety. The case is really concluded by authority. Under the corresponding provision of the Bankruptcy Act, 1869, there were no express words, such as there are in the present enactment, limiting the effect of the disclaimer to the bankrupt's liability, and yet it was held in the decisions with regard to that Act, that the lease was only to be deemed to be surrendered as regards the bankrupt and not as regards other persons: *Harding* v. *Preece* (2); *Hill* v. *East and West India Dock Co.* (3); *Ex parte Walton, In re Levy.* (4) It is submitted that the present enactment is only intended to have the same effect which the decisions gave to the former enactment on the subject. If the lease is only to be considered as determined quoad the

(1) Sect. 55, sub-s. 2, of the Bankruptcy Act, 1883: "The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person."

(2) (1882) 9 Q. B. D. 281.

(3) (1884) 9 App. Cas. 448.

(4) (1881) 17 Ch. D. 746.

C. A. 1901

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bankrupt and his property, then the liability of the surety continues: and he will be entitled to prove in the bankruptcy in respect of that liability.

Montague Lush, for the defendant. The words of the corresponding enactment of the Bankruptcy Act, 1869, are widely different from those of the enactment now in question, and in the cases referred to by the plaintiff's counsel the question was not the same as that which arises in the present case. In those cases persons other than the lessee were interested in the lease. The question whether a disclaimer by the trustee in bankruptcy of an assignee of the lease destroyed the liability of the lessee upon his covenant to pay rent or that of a surety for him is obviously altogether different from the question whether the surety for the lessee can remain liable when the lessee has ceased to be liable, and the lease has been determined as between the lessee and lessor. The effect of the disclaimer in such a case as this is that, no other person being interested in the term, it is determined altogether, and the lessor becomes immediately entitled to the demised premises, which revest in him in possession: see *In re Finley, Ex parte Clothworkers' Co.* (1) Under the words of s. 55, sub-s. 2, the term only remains in existence so far as may be necessary to preserve the rights of third persons, such as assignees or underlessees, if any, but, by the last part of the section, that saving of the rights of such persons is subject to exception so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from all liability. If the liability of the surety for rent in futuro continues, the indirect result must be that the liability of the bankrupt in respect of such rent will really continue, for the surety will be entitled to indemnity against him: see per Watkin Williams J. in *Harding* v. *Preece*. (2) It is submitted that it is impossible that the liability of the surety under such a guarantee as this for rent after the disclaimer can continue, when the principal debtor has ceased to be liable, and the rent really no longer exists. The lessor is entitled to the land, and he cannot be entitled at the same time to payment of the rent under the determined

(1) (1888) 21 Q. B. D. 475. (2) 9 Q. B. D. 281.

lease by the surety. The result of the contention for the plaintiff would be to impose an altogether different contract on the defendant from that which he in fact entered into. He never contracted to be primarily liable for the rent, but only as surety for the lessee. The terms of the guarantee carefully guard against the liability now sought to be imposed on the defendant, for it expressly states that he is to be liable for rent in arrear for twenty-one days, which implies that the lessee has made default in payment of rent due from him; and it is further provided that the guarantee shall continue "concurrently with the lease." The lessee cannot make default after the disclaimer, for he is no longer liable, and the lease is at an end.

Sylvain Mayer, in reply, referred to *Ex parte Llynvi Coal and Iron Co., In re Hide.* (1)

A. L. SMITH M.R. This is an appeal from the judgment of Phillimore J., who held that the effect of the disclaimer by the trustee in bankruptcy of the lessee was to determine the term as between the lessor and the lessee, and that therefore no rent could subsequently accrue due under the lease from the lessee, and consequently the defendant, as surety, could not be called upon in respect of any such rent as being in arrear. The question is, what is the effect of a disclaimer of the lease by the trustee in bankruptcy of the lessee upon a guarantee such as that given by the defendant? I do not propose to go through the cases with reference to the Bankruptcy Act, 1869, because, as the defendant's counsel pointed out, there is a wide difference between the phraseology of that Act with regard to this subject and that of the Act which we have to construe; and in my opinion the question in this case is really concluded by the judgment of this Court in *In re Finley, Ex parte Clothworkers' Co.* (2) The Court had in that case to determine the meaning in s. 55, sub-s. 2, of the Bankruptcy Act, 1883, of the words "the disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt, and his property, in or in respect of the property disclaimed."

(1) (1871) L. R. 7 Ch. 28. (2) 21 Q. B. D. 475.

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Lindley L.J. said in delivering the judgment of the Court: "Now the operation of those clauses in the simple case of a lease is not very difficult to ascertain. If there is nothing more than a lease, and the lessee becomes bankrupt, the disclaimer determines his interest in the lease under sub-s. 2. He gets rid of all his liabilities, and he loses all his rights by virtue of the disclaimer. There is no need of any provision for vesting the property in the landlord, but the natural and legal effect of sub-s. 2 is that the reversion will become accelerated." In other words, the effect of the sub-section is that in such a case the lease is put an end to altogether as between the lessor and the bankrupt lessee, the intention being that the bankrupt shall be altogether freed from any obligation arising under or in relation to it; and, consequently, no other person being interested in the lease, it ceases to exist. As the lease is determined, no rent can, subsequently to the disclaimer, become due under it: the reversion on the term is in effect accelerated; and the lessor gets back his property, and can let it to another tenant, for aught I know, at a higher rent. Then what is the effect on the liability of the surety? It is suggested that, although no more rent can become due from the bankrupt lessee, nevertheless the surety remains liable for rent subsequently accruing. I do not think that is so. The object of s. 55, sub-s. 2, is that the bankrupt, and his estate, should be entirely freed from liability for future rent in respect of the lease; but, if the plaintiff's contention is correct, that object would not be obtained. I think the defendant's counsel was right in the construction which he sought to put on the words at the end of the sub-section, "except so far as is necessary for the purpose of releasing the bankrupt and his property, and the trustee from liability." If the surety is liable to pay rent in futuro on his guarantee, he would be entitled to indemnity against the bankrupt or his property. It is therefore necessary, in order to release the bankrupt and his property from liability under the lease subsequently to the disclaimer, that the words at the end of the sub-section should be brought into play in such a case.

Again the guarantee is on the face of it for payment of rent

"in arrear." But, how can rent be "in arrear" after the date of the disclaimer, the lease being then at an end as against the lessee? There is another point which tells against the plaintiff, although I do not rest my judgment upon it. It was argued that the words "concurrently with the lease" were inserted to meet a case like this. I do not feel sure, however, that that was the intention with which those words were inserted. For the reasons I have before given I think that this appeal should be dismissed.

COLLINS L.J. I am of the same opinion. The claim in this case is against the defendant as a surety, and the condition under which the defendant undertook liability was that there should be rent in arrear under the lease for twenty-one days. In order therefore to sustain his claim against the defendant, the plaintiff must be able correctly to aver that rent was in arrear from the lessee. It appears to me that he was not in a position truly to make that averment, for the sum claimed was in respect of rent alleged to have accrued subsequently to February 15, 1900, and on that date the trustee in bankruptcy of the lessee disclaimed the lease. The effect of such a disclaimer in a case which is not complicated by the existence of any assignment or underlease is stated in the passage read by the Master of the Rolls from the judgment of Lindley L.J. in the case of *In re Finley, Ex parte Clothworkers' Co.* (1) The effect of the disclaimer in such a case is stated by him to be that the bankrupt lessee gets rid of all his liabilities, and loses all his rights under the lease; and there is no need of any provision to revest the property in the landlord, but the natural and legal effect is that the reversion becomes accelerated. The result being that the liability of the lessee for future rent under the lease is determined, the obligation of the surety under his guarantee in respect of such rent can never arise, because no such rent can ever become in arrear. It seems to me that this case stands entirely outside the cases cited to us, in which the rights of the lessor against the original lessee survived. Here the question is whether the obligation of a surety on this special

(1) 21 Q. B. D. 475.

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Collins L.J.

form of contract can survive, when the liability of the principal debtor, the lessee, has been put an end to by statute. The liabilities of a surety are in law dependent upon those of the principal debtor, and I do not see how it can be said that in such a case as this the liabilities of the latter are determined without incidentally saying that those of the former are determined also. The lessor in this case is, upon the disclaimer, entitled to resume possession of the premises. That being so, how can he treat himself as a person to whom the lessee is still tenant; and, unless he can do so, how can the surety be liable? I do not see how the lessor can possibly be entitled to the premises, and have the right to relet them, and yet retain the liability of the defendant as surety for the bankrupt lessee. Under the earlier bankruptcy law, before the power of disclaimer was introduced, the bankrupt remained liable: *Auriol* v. *Mills* (1), and the surety, if compelled to pay the rent, could have claimed repayment from him; so that the bankrupt was not discharged. I think that what the Legislature intended in such a case as this was that the lease should be determined by the disclaimer as between the lessor and the lessee, and therefore incidentally as regards the surety, with the result that the bankrupt lessee is discharged and incidentally the surety also: and the lessor, getting back his land, can let it to some solvent tenant, and has a right to prove as against the bankrupt's estate for possible loss by reason of not being able to let the land on such favourable terms. This is in accordance with *Tuck* v. *Fyson* (2), decided under the Act of George IV., where it was held that the surety remained liable *until* the delivery up of the lease to the lessor under the then statute. If disclaimer under the present law operates in the language of Lindley L.J. to "accelerate the reversion," the condition of the surety's liability in this case must necessarily fail, and I agree with my Lord as to the effect of the concluding clause.

ROMER L.J. I agree. I think that the case is governed by the words "except so far as is necessary, &c.," at the end of sub-s. 2 of s. 55 of the Bankruptcy Act, 1883. Bearing in

(1) (1790) 4 T. R. 94; 2 R. R. 341. (2) (1829) 6 Bing. 321.

mind the facts that in this case no person had any estate in the demised premises except the lessor and the bankrupt lessee, and that the liability alleged against the defendant is that of a surety for the payment of rent due upon the lease, it appears to me that the case comes within those words of the sub-section; and that it is necessary, for the purpose of releasing the bankrupt, and his property, and the trustee in bankruptcy from future liability in respect of the lease, that the liability of the defendant should be determined by the disclaimer. The section does not operate so as to cast upon third persons liabilities different in kind from what they were under before the disclaimer. Here, if the appellant was right in his contention, the section would so operate. For the defendant has only agreed to be liable as surety for the payment of rent by a lessee under a lease: and yet the appellant seeks to make him liable to pay money, though there is no rent payable, no lease, and no person in the position of lessee.

Appeal dismissed.

Solicitor for plaintiff: *H. A. Maude, for W. H. Stacey, Sheffield.*

Solicitors for defendant: *Pepper, Tangye & Co., for Pepper, Tangye & Winterton, Birmingham.*

E. L.

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Jan. 16.

MOSES *v.* MARSLAND.

London — Buildings — Public Building — Hospital — "Public Purpose" — Home for Defective Children—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 5, *sub-s.* 27.

A house provided by the managers of the Metropolitan Asylums District as a permanent home (but not as a school), for children, who by reason of defect of intellect or physical infirmity cannot be properly trained in association with children in ordinary schools, is not a "public building" within the meaning of the London Building Act, 1894.

CASE stated by a metropolitan police magistrate.

The appellant was a builder who was engaged in carrying out certain alterations for the managers of the Metropolitan Asylums District at a building No. 16, Elm Grove, Peckham, in the district of Camberwell. The respondent was a district surveyor for the district of Camberwell under the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.).

The appellant had been summoned by the respondent for neglecting to comply with a notice served on him by the respondent as such district surveyor, requiring him to do certain things under the provisions of the London Building Act, 1894, whilst carrying out such alterations.

The following facts were proved or admitted at the hearing:—

(*a*) That by an order of the Local Government Board dated April 2, 1897, the case of children who by reason of defect of intellect or physical infirmity cannot properly be trained in association with children in ordinary schools was placed in the hands of the managers of the Metropolitan Asylums District.

(*b*) That the managers for the purpose of carrying out such order prepared a scheme for purchasing various dwelling-houses in different parts of London adjacent to schools specially provided and staffed by the London School Board for the education of children of this class. That under such scheme the children were to live, sleep, and board in such houses under the care of a responsible matron, in numbers generally not exceeding fourteen

in any one house, and to attend such special board schools each day for the purpose of their education. That such houses were intended to be permanent homes for the children.

(*c*) That the building 16, Elm Grove had been an ordinary detached dwelling-house of two floors with one room and a basement below, and had been purchased by the managers under the scheme, and that they had instructed the appellant under the supervision of the board's architect to alter or convert the dwelling-house, to make it suitable for the accommodation of twelve to fourteen children and a matron, cook, and housemaid (the latter in the exclusive service of the board). That the total cubical capacity of the dwelling-house was under fifty thousand cubic feet with sleeping accommodation as above.

(*d*) Before the appellant began the alterations he served the building notice required by s. 145 on the respondent, and during the course of carrying out the alterations the respondent served certain notices on the appellant.

No point of estoppel which might possibly arise as against the builder in consequence of the form of his notice to the district surveyor was pressed. But treating the real parties to the summons as the district surveyor and the managers of the Metropolitan Asylums District, and assuming the managers not to be legally affected by the form in which their builder gave his original notice, the only question that was argued was whether the building under the above circumstances was a public building within the London Building Act, 1894, s. 5, sub-s. 27, and ss. 68, 79.

The learned magistrate was of opinion that, regard being had to the terms of s. 5, sub-s. 27 (1), and of ss. 68, 79, the building

(1) 57 & 58 Vict. c. ccxiii. (London Building Act, 1894), s. 5: "In this Act, unless the context otherwise requires . . . . (sub-s. 27) The expression 'public building' means a building used or constructed or adapted to be used as a church, chapel, or other place of public worship, or as a school, college, or place of instruction (not being merely a dwelling-house so used), or as a hospital, workhouse, public theatre, public hall, public concert-room, public ball-room, public lecture-room, public library, or public exhibition-room, or as a public place of assembly, or used or constructed or adapted to be used for any other public purpose, also a building used, or constructed, or adapted to be used as an hotel, lodging-house, home, refuge, or

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was in the hands of the managers of the Metropolitan Asylums District used or constructed or adapted to be used for a public purpose, and he made the order asked for by the district surveyor.

The question, in the opinion of the Court, was whether the order was rightly made.

Macmorran, Q.C. (*Herbert Smith* with him), for the appellant. The house is not a public building within the meaning of s. 5, sub-s. 27, of the London Building Act, 1894; it is in ordinary language a home where the children reside. It does not come within the first part of the section as a school, for no teaching is done there; neither is it a hospital, for it is not used for the purpose of curing the physical infirmities of the inmates. Nor is it a building used for "any other public purpose." It is apparent from *Josolyne* v. *Meeson* (1) that the test by which to ascertain whether a building is used for a public purpose is not whether it is used in the public interest, but whether it is a place to which the public have a right of admission. Further, to satisfy the sub-section the public purpose for which a building is used must be ejusdem generis with those mentioned in the sub-section itself.

R. Cunningham Glen, for the respondent. The decision of the magistrate was right. It is important to see for what class of children the building is provided: they are children of defective intellect and suffering from physical infirmity. Hospitals are public buildings within the meaning of the sub-section, and if this building is in one sense a home, it is in another sense clearly a hospital. It is also a building used for a public purpose ejusdem generis with those mentioned in the sub-section, for the inmates do not go there of their own free will, but are sent there by a public body in performance of a public duty. The case of *Josolyne* v. *Meeson* (1) is distinguishable, for there the public were rigorously excluded from the building in question.

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shelter, where such building extends to more than two hundred and fifty thousand cubic feet, or has sleeping accommodation for more than one hundred persons."

(1) (1885) 53 L. T. 319.

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BRUCE J. I am of opinion that this building is not a public building within the definition contained in s. 5, sub-s. 27, of the London Building Act, 1894. It has been contended on behalf of the respondent that it is a hospital; I cannot think so. Originally no doubt "hospital" was a word of a very wide signification, as is apparent from the meanings in the Oxford English Dictionary; the quotation from Spenser's "Faerie Queene" there given, "They spide a goodly castle . . . . which choosing for that evening's hospitale, They thither marcht," shews that any place of lodging would be included in the old meaning of the word. In modern times, however, the signification of the word has been greatly narrowed, and it has acquired specially the meaning of a place for the treatment of the sick and infirm. In the present case we are dealing with a home for children, not with a hospital for their treatment when sick or infirm, and I do not think that the place can properly be said to be a hospital. Then, is it a building used or constructed or adapted to be used for "any other public purpose" within the meaning of the sub-section? I think not. Following the case of *Josolyne* v. *Meeson* (1), which is binding upon us, I think that the substance of that decision is that a place used for public purposes means, not a place used in the public interest, but a place to which the public can demand admission or to which they are invited to come; the meaning of the expression has been limited in that way by that decision. In any view of the case, however, I think that the expression "other public purposes" must mean public purposes ejusdem generis with those previously mentioned in the sub-section, and would not include such a "home" as that with which we are dealing. And, further, I agree with the contention on behalf of the appellant that a "home" does not come within the expression "public building" unless it satisfies the latter part of the sub-section—that is to say, unless it extends to more than two hundred and fifty thousand cubic feet, or has sleeping accommodation for more than one hundred persons; that is not the case here. I think, therefore, that the

(1) 53 L. T. 319.

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appeal should be allowed, and that the decision of the learned magistrate should be reversed.

PHILLIMORE J. I am of the same opinion. It is of course conceivable that this building may be both a home and a hospital; but I think that it is not. In my judgment the word "hospital" in this sub-section is not used in the old sense to which my learned brother has referred, nor is it used in the old legal sense in which it was used by Coke; it is used in the modern sense which is familiar to us all. There is no reason for saying in the present case that the children are kept in this building for the treatment of their physical ailments. In 1897 the Local Government Board and the Metropolitan Asylums Board anticipated what is now, by virtue of 62 & 63 Vict. c. 32, a general legislative provision; they provided special schools for children in receipt of poor relief, who were incapable of being taught in association with ordinary children by reason of defective intellect or physical infirmity, and as an adjunct to those schools these homes were provided in which the children are maintained. Some of the children in a home may not be infirm, others may be; but they are not in the home for treatment: they are there for the purposes of maintenance during the period of their education. No doubt their bodily ailments must, as in the case of ordinary children, be attended to when necessary, but that is not the purpose for which they are there; the building is therefore, in my opinion, clearly not a hospital, but a home.

That would, I think, be sufficient to decide this case in favour of the appellant; but I desire to add that I agree with what has been said by my learned brother and with the decision in *Josolyne* v. *Meeson* (1) (by which indeed we are bound in this Court), that such a building as we are considering is not a building used for "other public purposes." It may be that the words "any other public purpose" were not wise words to use in the Act of 1894, but they had already received judicial interpretation, and for that reason, I presume, the draftsman left

(1) 53 L. T. 319.

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them in the new Act. The words do not deal with buildings intended for a charitable or public use, or used in the public interest, but with buildings used for a purpose which involves the admission of the public: that is the good sense of the thing. I think, therefore, that this building was not used for any public purpose within the meaning of the sub-section, and that the decision of the learned magistrate was wrong.

Appeal allowed.

Solicitors for appellant: *Williams & James.*
Solicitor for respondent: *Walter C. Williams.*

W. J. B.

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Jan. 17, 18.

Statutory Rules and Orders — Validity — Condition Precedent — Order of Secretary of State—Notice of making of Order—Coal Mines Regulation Act, 1896 (59 & 60 *Vict. c.* 43), *s.* 6.

By s. 6 of the Coal Mines Regulation Act, 1896, "a Secretary of State on being satisfied that any explosive is or is likely to become dangerous, may, by order, of which notice shall be given in such manner as he may direct, prohibit the use thereof in any mine, or in any class of mines, either absolutely or subject to conditions. . . . ."

Upon the hearing of a summons against the manager of a mine for contravention of an order purporting to be made by a Secretary of State under the above section, a Queen's printers' copy of the order was put in evidence; but no evidence was given of any notice by the Secretary of State of the making of the order or of any direction by him as to the manner in which notice of the order should be given:—

Held, that the provisions as to the giving of notice were directory only, and were not conditions precedent to the coming into operation of the order, and that the order of the Secretary of State was therefore valid and binding.

CASE stated by justices for the county of Glamorgan.

An information had been laid by the respondent charging that on or about May 7, 1900, the appellant, being the certificated manager of a certain coal mine in the parish of Aberdare, unlawfully contravened and did not comply with rule 4 of the Explosives in Coal Mines Order of July 24, 1899,

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made under s. 6 of the Coal Mines Regulation Act, 1896, to be observed in the said mine by him as such manager, to wit, by allowing detonators to be used in the mine in respect of which detonators the following conditions required by such rule had not been observed, namely, that detonators shall be under the control of the owner, agent, or manager of the mine, or some person specially appointed in writing by the owner, agent, or manager for the purpose, and shall be issued only to shot-firers or other persons specially authorized by the owner, agent, or manager in writing.

The proceedings were taken under rule 4 of the Explosives in Coal Mines Order of July 24, 1899, which is as follows: "On and after the first day of October, 1899, no detonator shall be used in any mine unless the following conditions are observed: (*a*) Detonators shall be under the control of the owner, agent, or manager of the mine, or some person specially appointed in writing by the owner, agent, or manager for the purpose, and shall be issued only to shot-firers or other persons specially authorized by the owner, agent, or manager in writing. (*b*) Shot-firers and other authorized persons shall keep all detonators issued to them until about to be used in a securely locked case or box separate from any other explosive."

The order was issued under s. 6 of the Coal Mines Regulation Act, 1896, which is as follows: "A Secretary of State on being satisfied that any explosive is or is likely to become dangerous, may, by order, of which notice shall be given in such manner as he may direct, prohibit the use thereof in any mine, or in any class of mines, either absolutely or subject to conditions, and the provisions of the principal Act as to contraventions of general rules shall apply to contraventions of any such prohibitions."

At the hearing the respondent's solicitor handed in a printed document, being a Government printers' copy of an order purporting to have been made by a Secretary of State under s. 6 of the Coal Mines Regulation Act, 1896, and the following facts were proved and were found as facts by the justices. The appellant was the certificated manager of

the Aberdare Merthyr Colliery, in which colliery detonators were used. The appellant as such manager received from the agent of the colliery a copy of the order of July 24, 1899, with instructions for him to see the provisions of the order carried out. Thereupon the appellant gave detonators to the under-manager, Daniel Davies, with verbal instructions to issue them to the workmen as required at the face of the workings, that is, the workmen's working place, and the appellant appointed John A. Lewis to be the shot-firer by an entry made in the journal of the colliery. The appellant did not make any appointment in writing placing detonators under the control of any person, and no such person was appointed in writing by the owner or agent. Daniel Davies, the under-manager, did not issue detonators, as verbally directed by the appellant, to the workmen at their working places. The workmen applied at the office of the colliery to Daniel Davies for detonators, and he supplied them there. Shortly before May 7, 1900, one John Lewis, a collier in the colliery, applied to Daniel Davies for detonators, and was told that there were none at the colliery; John Lewis thereupon bought seven detonators at an ironmonger's shop, and took them into the mine without the knowledge of the appellant. John Lewis charged a blasting hole and applied one of the detonators so bought by him, and sent for John A. Lewis, the appointed shot-firer, to fire the charge. Blasting charges in the colliery were exploded by electricity applied by John A. Lewis, the shot-firer; on this particular occasion the charge missed fire, and John Lewis withdrew the detonator, and whilst handling it, it exploded and blew his hand off. On behalf of the appellant it was argued:—

1. (*a*) That notice of the order of July 24, 1899, was necessary and had not been proved. (*b*) That no proof had been given on the part of the respondent of the making by a Secretary of State of the alleged order of July 24, 1899, set forth in the information. (*c*) That no proof had been given of any direction by a Secretary of State as to the manner in which notice should be given of the making of the order. (*d*) That there was no proof of any such notice having been

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given of the making of the order as required by s. 6 of the Coal Mines Regulation Act, 1896.

2. That upon the evidence it was clear that no detonators were issued by the under-manager on May 7, 1900, and that there were no detonators then under his control, and that the detonators used by John Lewis having been taken by him into the mine surreptitiously never got into the possession of the owner, agent, or manager, and could not therefore be under their control within the meaning of the said order.

The justices were of opinion as to contention 1, that the Government printers' copy was in itself sufficient evidence of the alleged order of July 24, 1899, having been made by a Secretary of State, and of a direction by him as to the manner in which notice should be given of the making of such order, and that the sending of the order by the agent of the colliery to the appellant was also sufficient evidence of such notice having been given within the meaning of s. 6 of the Coal Mines Regulation Act, 1896.

As to contention 2, they were of opinion that, although no detonators were issued by the under-manager on May 7, 1900, yet it was the practice at the mine to allow Daniel Davies, the under-manager, to have the control of the detonators, he not being a person specially appointed in writing for the purpose, and it was the practice for him to issue detonators to persons other than shot-firers or other persons specially authorized in writing.

The questions of law for the opinion of the Court were thus stated :—

Was the printed document (1) produced sufficient proof of the making of the alleged order of July 24, 1899, by the Secretary of State, and was the printing of such document sufficient evidence of a direction by a Secretary of State as to the manner in which notice should be given of the making of such order, and was the sending of the order by the agent of the colliery to the appellant sufficient evidence of such notice

(1) That is, the Government printers' copy of the order of the Secretary of State.

having been given as required by s. 6 of the Coal Mines Regulation Act, 1896?

Were the justices right in convicting the appellant on the ground that, although no detonators were used by the under-manager on May 7, 1900, yet the practice of the mine was to place detonators under the control of the under-manager who was not specially appointed for that purpose in writing, and it was the practice for him to issue detonators to persons other than shot-firers or other persons specially authorized in writing?

B. Francis-Williams, Q.C. (*Trevor Lewis*, with him), for the appellant. The conviction was wrong. There was no breach by the appellant of the order of the Secretary of State. The summons and conviction were for permitting the use of detonators in the mine contrary to the Secretary of State's order, but there was no evidence that he permitted their use; the evidence in fact negatived any permission by him, for the detonators were brought into the mine and used without his knowledge. Further, there was no proper proof that notice had been given in accordance with the Secretary of State's directions of the making of the order, or that the Secretary of State had given any directions as to the mode in which notice was to be given or the order to be published; such a notice is a condition precedent to the enforcement of the order. There was no evidence that the Secretary of State was satisfied that the explosive was or was likely to become dangerous.

H. Sutton, for the respondent. The order of the Secretary of State was a statutory rule, for by the Treasury Regulations of August 9, 1894, which were made under the Rules Publication Act, 1893, every exercise of a statutory power by a rule-making authority, which is of a legislative and not an executive character, is to be held to be a statutory rule within s. 3 of the Act. By s. 3 of that Act all statutory rules are to be sent to the Queen's printer, and to be numbered, printed, and sold by him, and if this is done there is sufficient notice given of the making of the rule. It must be presumed that the Secretary of State ordered that publication by the Queen's printer should be sufficient notice of the making of the order; the document

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could not have come into the Queen's printers' hands except from the Secretary of State. The notice to be given under s. 6 by the Secretary of State is essentially an official act, and there is a presumption that such an act was in fact done. The provision as to notice is directory only, and is not a condition precedent: *Le Feuvre* v. *Miller*. (1)

Secondly, the appellant was on the facts properly convicted. It is true that the detonators were brought surreptitiously into the mine, and were not under the appellant's control, but there were clear breaches of regulations for which he was responsible; no person was appointed in writing to have control of the detonators as required by the order, and it is found in the case that the practice in the mine was that the detonators were under the care of a person not appointed in writing, and were issued to persons who were neither shot-firers nor specially appointed in writing. It is immaterial to consider whether these facts amount to permission by the appellant to use the detonators in an unauthorized way, for under s. 50 (2) of the Coal Mines Regulation Act, 1887, the manager is responsible for the user of the detonators, though he did not permit them to be used; the summons, it is true, is for permitting their use, but no objection can now be taken to the summons on the ground that it was defective in point of form. Further, by s. 6 of the Act of 1896, the provisions of the Act of 1887 as to contraventions of general rules apply to contraventions of the prohibition of the Secretary of State of the use of explosives; the effect of this enactment is that rule 4 of the order of the Secretary of State is placed in the same category as a general rule under the Act of 1887, and the appellant is liable under the circumstances of the case for its contravention.

(1) (1857) 8 E. & B. 321.

(2) By s. 50 of the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), "Every person who contravenes or does not comply with any of the general rules in this Act shall be guilty of an offence against this Act; and in the event of any contravention of or non-compliance with any of the said general rules in the case of any mine to which this Act applies, by any person whomsoever, the owner, agent, and manager shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the said rules as regulations for the working of the mine, to prevent such contravention or non-compliance."

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B. Francis-Williams, Q.C., in reply. The appellant cannot be convicted in respect of an Act done on May 7, for the person who used the detonators on that day had no relation to him, and acted without his knowledge or permission. The appellant took the best possible precaution to prevent a contravention of the rule by having no detonators in the mine, and the justices did not consider the point whether he had used all reasonable means to insure compliance with the rule. As to notice of the order, it is not suggested that any such notice was in fact given by the Secretary of State. The Rules Publication Act, 1893, no doubt indicates a way in which notice may be given, but it does not help the respondent, for s. 6 of the Act of 1896 says in terms that notice is to be given in such way as the Secretary of State shall direct. That provision is not merely directory, and the notice is a condition precedent to the operation of the order of the Secretary of State.

BRUCE J. Two main points have been argued in this case. The first relates to the question whether the order of the Secretary of State is valid and binding. The provision for making the rule is contained in the Coal Mines Regulation Act, 1896, and is in these words: "A Secretary of State, on being satisfied that an explosive is or is likely to become dangerous, may, by order, of which notice shall be given in such manner as he may direct, prohibit the use thereof in any mine or in any class of mines." It was contended that it did not appear that the Secretary of State had been satisfied, or that any evidence had been laid before him, that this explosive was or was likely to become dangerous. I think the fact that the Secretary of State has undoubtedly made an order is sufficient evidence that he was satisfied that the explosive was likely to become dangerous. The main point relied upon for the appellant was that there was no evidence that any notice had been given by the Secretary of State of the order or that any direction had been given as to the manner in which the notice should be published. I am not satisfied, after considering the evidence on behalf of the respondent, that any notice was given by the Secretary of State, or that he did direct in what manner

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the notice should be published, and therefore I am driven to consider whether the giving of the notice and the publication of the notice by the Secretary of State is or is not a condition precedent to the order coming into force. I think it is not. I think that the directions contained in the section about notice are directory only; that the order comes into force when it is made by the Secretary of State, and although power is given to him to give notice of the order and to direct how notice shall be given of the order, yet that is not essential to the order coming into operation, but is merely directory, and the fact that no notice is given does not prevent the order having effect. Therefore I have come to the conclusion that the order was good and valid, although there is no evidence before us of any notice given by the Secretary of State, or of any direction as to how the notice should be given.

The next question is whether there was evidence of the committal of the offence on May 7, the day mentioned in the information. The appellant was convicted of allowing detonators to be used in the mine on that day. I have some difficulty in finding that there was evidence that the appellant allowed the detonators to be used, but I think it was undoubtedly proved that on that day detonators were used in the mine; it has also been proved that the appellant was at that time the manager of the mine. Now, when we come to s. 50 of the Coal Mines Regulation Act, 1887, we find that "every person who contravenes or does not comply with any of the general rules in this Act shall be guilty of an offence against this Act; and in the event of any contravention of or non-compliance with any of the said general rules in the case of any mine to which this Act applies by any person whomsoever, the owner, agent, and manager shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the said rules as regulations for the working of the mine, to prevent such contravention or non-compliance." I think the respondent has satisfied us that the rule in question is a rule coming within the meaning of this section. We therefore have it proved that there was undoubtedly a contra-

vention by some person of the rule in question on May 7; we also have it proved that the appellant was the manager of the mine at that time, and therefore the justices would have jurisdiction to convict him as manager of the mine without finding whether he had allowed the particular act to be committed, if it was committed, on May 7. The act was committed; he was the manager at the time, and therefore he must be taken to be responsible for it, unless he satisfies the justices that he had taken all reasonable means to the best of his power to enforce all rules and regulations in the mine to prevent such contravention. It does not appear to me that the justices have taken that into consideration, and therefore I think that if the appellant's counsel had wished it we ought to have sent the case back to the justices in order that they might consider whether they were or were not satisfied that the appellant had taken all reasonable means for enforcing the rules and regulations of the mine to prevent such contravention. But as we are not asked to do so, I think we must be content to come to the conclusion that the justices have acted simply upon the fact that there was a non-compliance on that day, and they have found that the appellant was manager of the mine at that time, and therefore he becomes responsible under this section for the act which was committed on that day by another person. They have found that he allowed the detonators to be used; I do not think it necessary that they should have found it. We must take it that if they found he had allowed it, they would probably have found that he had not taken the best means in his power to prevent it. Therefore I have come to the conclusion that, as we are not asked to send the case back to the justices to consider the last point, we must arrive at the conclusion that the justices acted rightly, and that the appellant was properly convicted.

PHILLIMORE J. I am of the same opinion for the same reasons, and have only a few words to add upon the last point touched upon by my learned brother. When the Crown had proved that there had been an illegal use of detonators and that the appellant was manager of the mine, they had proved

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all that was requisite. The burthen of calling the attention of the justices to the further point and of proving it lay upon the appellant. I agree that the form of the summons was confusing, and that it would have been fair to the appellant, if there had been any possible chance of his being acquitted, to send that point down for reconsideration, and if the learned counsel had pressed us we should have done so; but I think he is wise in not pressing for it, for it is pretty clear upon the evidence that no magistrate could have found that he had taken all reasonable means to the best of his power to enforce the regulation. Then the summons is puzzling, because it is misconceived. It is no offence per se to allow an illegal act to be done; it is an offence to cause an illegal act to be done, or possibly to direct it to be done, but not to allow or suffer it to be done. Upon the principle of "Omne majus continet in se minus," adopted by the Court for the Consideration of Crown Cases Reserved in *Reg.* v. *West* (1), I am of opinion that the conviction was good and must be adopted by this Court.

Appeal dismissed.

Solicitors for appellant: *Bell, Brodrick & Gray, for Linton & C. & W. Kenshole, Aberdare.*

Solicitor for respondent: *Solicitor to the Treasury.*

(1) [1898] 1 Q. B. 174.

W. J. B.

In re THE GLOUCESTER MUNICIPAL ELECTION PETITION, 1900 (TUFFLEY WARD).

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FORD AND OTHERS, PETITIONERS *v.* NEWTH, RESPONDENT.

Municipal Corporation—Election—Town Councillor—Disqualification—Contract with Council—Release by Committee—Ratification by Council—Relation—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 12, *sub-s.* 1 (*c*).

A petition was presented against a town councillor, alleging that his election was void on the ground that, at the date of his nomination, he had an interest in a contract with the council.

The respondent, in answer to an advertisement, had offered to supply to the council, for twelve months, certain goods at specified prices, and the offer was accepted. Afterwards he applied to a committee of the council to be released from his contract. The committee resolved that, subject to approval by the council, he be released from that date. He was then nominated. After his nomination the council approved the resolution of the committee releasing him.

On argument of questions of law reserved:—

Held, that the advertisement, tender, and acceptance constituted a contract, that the respondent had an interest in the contract, that the ratification, after the respondent's nomination, of the resolution releasing him did not relate back to the date of the resolution, because the interests of persons other than the parties to the contract might be affected, and therefore the respondent, at the date of his nomination, had an interest in a contract with the council, and was disqualified, and his election was void.

Bolton Partners v. *Lambert*, (1889) 41 Ch. D. 295, distinguished.

ARGUMENT of questions of law reserved by Mr. Mansel Jones, a Commissioner for the trial of municipal election petitions.

A petition was presented under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), against the return of the respondent to the office of town councillor for the Tuffley Ward of the city of Gloucester, which was tried before the Commissioner on January 29 and 30, 1901, at Gloucester. The election was held on November 1, 1900, when the respondent was declared to be elected. The petition alleged that William James Newth was disqualified for being nominated, and for being elected, and for being a councillor, on the ground that at

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the time of his nomination and election he had an interest in a contract with, by, or on behalf of, the council of the city, and prayed that it might be determined that William James Newth was not duly elected, and that his election was void. (1)

It was proved that the council of the city of Gloucester upon December 5, 1899, advertised for certain articles for the use of the corporation during the ensuing year, and invited tenders. The advertisement was as follows: "The Streets Committee of the Gloucester Corporation are prepared to receive tenders for the supply of the following materials for the twelve months ending 31 December, 1900, viz.:" (Here followed a list of articles, including, "Oil, colours, &c.") "Specifications and forms of tender may be obtained at the City Surveyor's Office, Guildhall, and tenders may be sent in to Mr. R. Read, City Surveyor, Guildhall, Gloucester, on or before Wednesday, 13 December inst.: Tenders must be inclosed separately in envelopes provided for the purpose, and indorsed with the name of the class of materials tendered for. The lowest or any tender will not necessarily be accepted."

On December 13, 1899, the respondent tendered for certain goods in the following form, which he had obtained from the council's office:—

"City of Gloucester.

"To the Street Committee.

"Gentlemen,—I hereby offer to supply for the twelve months ending December 31, 1900, the undermentioned goods as required, the best of their respective kinds, and to the entire satisfaction of the city surveyor, delivered at the corporation depôt, Stroud Road, Gloucester, in guaranteed makers' drums or barrels sealed down."

Then followed a long list of articles and prices. It was signed by the respondent. On December 22, 1899, the street committee resolved that it be recommended that certain tenders

(1) By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 12, sub-s. 1, "A person shall be disqualified for being elected and for being a councillor if and while he . . . . (c) has, directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of the council."

be accepted at the prices therein mentioned, among them being that of the respondent for oil and colours. On the same date a letter was sent to him informing him that his tender was accepted. On January 30, 1900, at a quarterly meeting of the council, it was resolved that the minute of the street committee of December 22, 1899, be approved, adopted, and confirmed. From December 22, 1899, up to and including October 20, 1900, the respondent supplied from time to time goods according to the tender, when and as required by the council, and received payments for the same from time to time to a considerable amount. On October 19, 1900, there were various accounts amounting to over 54*l.* due to him, which were not all paid until December 19. On October 19, 1900, the respondent being anxious to stand as a candidate at the forthcoming election of councillors in November, applied to the finance, estates, and waterworks committee (and not to the street committee, who had risen for the day) to be relieved from his tender or contract, when the following minute and resolution of that committee was passed: "It was reported that Mr. W. J. Newth intended to offer himself as a candidate at the following election if not prejudiced by the fact that he had given an estimate for supplying certain articles that may be required by the corporation up to the end of the year.

"Resolved

"That subject to this minute being approved by the council, Mr. Newth be released from the estimate or contract referred to, as from this date."

On October 24 the respondent was nominated, and on November 1 declared to be elected to the office of councillor. On October 30 the council resolved that the minute of the finance, estates, and waterworks committee be approved, adopted, and confirmed.

On the above facts being proved it was contended by the respondent's counsel that the respondent was not disqualified for being elected and for being a councillor under s. 12, sub-s. 1 (*c*), of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), on the ground that: I. There was no contract. II. If there was a contract, it was rescinded before October 24.

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III. The existence of a debt for goods supplied before October 24, and not paid for until December, was not an interest in any contract within the meaning of the section. The Commissioner determined, subject to the opinion of the High Court of Justice on the question of law submitted, that William James Newth was not duly elected, and that his election was void, but postponed granting his certificate until the question now submitted for the consideration of the High Court of Justice had been determined by them. The question for the opinion of the Court was whether William James Newth was disqualified for being nominated and elected, and for being a councillor. If the Court should determine in the affirmative, the certificate was to be that William James Newth was not duly elected, and that his election was void, and if in the negative that William James Newth was duly elected and that his election was valid.

H. Terrell, K.C., for Mr. Newth, the respondent to the petition, claimed the right to begin. On the argument of the points reserved the respondent to the petition is in the position of a party appealing from the decision of the Commissioner.

Asquith, K.C., for the petitioners. There is no express decision as to this question, but the practice appears to have been contrary to that suggested on the other side. The Commissioner has not decided anything, but has merely reserved points for the consideration of the Court: Municipal Corporations Act, 1882, s. 93, sub-s. 8. [He referred to *Ackers* v. *Howard* (1); *Isaacson* v. *Durant*. (2)]

[DARLING J. We think the respondent to the petition should begin.]

H. Terrell, K.C. (*Coward, K.C.*, with him), for the respondent. The case does not come within s. 12, sub-s. 1 (*c*), of the Municipal Corporations Act, 1882. The respondent had not any share or interest in a contract, within the meaning of that section, which could have the effect of disqualifying him for being elected or acting as town councillor. The documents in the case do not amount to a contract. The respondent's

(1) (1886) 16 Q. B. D. 739. (2) (1886) 17 Q. B. D. 54.

tender was no more than a price list, and the letters imposed no obligation on the council. In *Sykes* v. *Dixon* (1), a case somewhat similar to the present, Lord Denman C.J., in delivering the judgment of the Court, said: "We think that the agreement put in was no contract of service; for it was altogether on one side. Bradley was to serve one person only; but that one was not bound to employ him. It was contended for the plaintiff that a promise must be implied on the master's part to pay Bradley for his labour; but that would be the same in any service to which Bradley might engage himself; it is no consideration for this contract." This language is applicable to the present case, and the respondent's contention is also supported by *Burton* v. *Great Northern Railway* (2), *Royse* v. *Birley* (3), and *Great Northern Railway* v. *Witham.* (4).

If there was a contract, it was put an end to by the resolution of the finance, estates, and water works committee dated October 19, 1900. If the committee had no authority to put an end to the contract, their action was ratified by the resolution of the council dated October 30, 1900, and this ratification would relate back to October 19: *Bolton Partners* v. *Lambert* (5); *In re Portuguese Consolidated Copper Mines.* (6) The contract therefore, if there was one, was put an end to before October 24, the date of the respondent's nomination.

It is said that the relation of debtor and creditor existed on October 24, because before that date the respondent had supplied some oil, for which he had not then been paid, and that this relation made the respondent interested in a contract; but if this were so it would be in the power of the council to disqualify any intending candidate by purchasing goods from him and refusing to pay.

Asquith, K.C. (*Ruegg, K.C.*, and *S. H. Day* with him), for the petitioners. As to the first point, the advertisement, the tender by the respondent, and the acceptance, taken together, are enough to constitute a contract, and the words of s. 12,

(1) (1839) 9 A. & E. 693, at pp. 698, 699.
(2) (1854) 9 Ex. 507.
(3) (1869) L. R. 4 C. P. 296.
(4) (1873) L. R. 9 C. P. 16.
(5) 41 Ch. D. 295.
(6) (1890) 45 Ch. D. 16.

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sub-s. 1 (*c*), of the Act are wide enough to cover the present case.

As to the second point, it is clear that the resolution of the committee passed October 19, 1900, would not bind the council: Municipal Corporations Act, 1882, s. 22, sub-s. 2. The ratification by the council could only relate back to the original resolution if the question were entirely inter partes, but here the interests of other persons, electors and candidates or intending candidates, may be affected, for an election is a public matter: *Bird* v. *Brown* (1); *Harford* v. *Linskey*. (2) This view, that the doctrine of ratification can only be made applicable inter partes, distinguishes *Bolton Partners* v. *Lambert* (3), and that decision appears to have been questioned by the Judicial Committee of the Privy Council in *Fleming* v. *Bank of New Zealand*. (4)

The third point does not arise if the petitioners are right on the others, but it seems difficult to see how it can be said that a creditor is not interested in the contract.

H. Terrell, K.C., replied.

DARLING J. This case arises out of the trial of a municipal election petition for the Tuffley Ward of the city of Gloucester. The respondent to the petition, Mr. Newth, was nominated and elected to the office of town councillor for the Tuffley Ward, and it is objected by the petitioners that he was disqualified for being elected and acting as town councillor by reason of an interest which it is alleged he had in a contract with the council. By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 12, sub-s. 1 (*c*), a person is disqualified for being elected and for being a councillor if and while he has, directly or indirectly, any share or interest in any contract or employment with, by, or on behalf of the council. Mr. Newth, the respondent, dealt in oil and colours in the city of Gloucester. On December 5, 1899, the council of the city advertised for certain articles for the use of the corporation during the ensuing year, and invited tenders. On December 13 the

(1) (1850) 4 Ex. 786.
(2) [1899] 1 Q. B. 852.
(3) 41 Ch. D. 295.
(4) [1900] A. C. 577.

respondent answered the advertisement in the following terms: "I hereby offer to supply for the twelve months ending December 31, 1900, the under-mentioned goods as required, the best of their respective kinds, and to the entire satisfaction of the city surveyor, delivered at the corporation depôt, Stroud Road, Gloucester, in guaranteed makers' drums or barrels sealed down." Then followed a long list of articles and prices, and the letter was signed by the respondent. The tenders were considered by the street committee, who on December 22 resolved that it be recommended that certain tenders be accepted at the prices therein mentioned, including the tender of the respondent for oil and colours, and on the same day a letter was sent to the respondent informing him that his tender was accepted. On January 30, 1900, at a quarterly meeting of the town council, it was resolved that the minute of the street committee of December 22, 1899, be approved, adopted, and confirmed. It is contended on the one side that Mr. Newth was disqualified from being elected as town councillor on the ground that he had a share or interest in a contract with the council. If he had a contract with the council there can be no doubt that the case comes within the words of the Act, and he was disqualified; but it is said on the other side that there was no contract, but only a promise to supply goods at certain prices if the respondent should be called upon to do so, and that the council was not under any obligation. If that were so, I should think there would be no contract; but the question is whether that is so or not. On this point there is no direct authority. In *Great Northern Railway* v. *Witham* (1) there was something more than we find in the present case, for in that case the order had been executed, and in deciding the case the judges expressly left open the question which arises here. Keating J. said: "If before the order was given the defendant had given notice to the company that he would not perform the agreement, it might be that he would have been justified in so doing." (2) If there had been a binding contract that could not have been so. Brett J. also expressed his opinion to the same effect: "I

(1) L. R. 9 C. P. 16. (2) L. R. 9 C. P. at p. 19.

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agree that this judgment does not decide the question whether the defendant might have absolved himself from the further performance of the contract by giving notice." (1) Therefore we are left without any definite authority covering the point raised, and we must refer to the words of the documents. The advertisement issued by the council on December 5, 1899, amounted to this, that the council agreed to receive tenders for the goods of specified kinds which they might want during a period of twelve months, and it concludes with the words, "the lowest or any other tender will not necessarily be accepted." Then on December 13 the respondent writes the letter already referred to, which amounts to a statement that he would supply the goods required during the period of twelve months, as ordered, at the prices specified. This is answered by the letter of December 22, by which the committee intimate that they will accept the respondent's tender for the articles which they may want during the period of twelve months at the prices specified in the tender. I think there is an obligation to order from the respondent such of the goods included in his tender as the council might require during the period of twelve months, for I do not think that the council would have been justified in treating the respondent's tender as a mere price list, and ordering the goods which they required from any one whom they might choose. The conclusion at which I have arrived, therefore, is that there was a contract, because there was an obligation on both sides, and, if it was a contract, it clearly was a contract in which Mr. Newth had an interest.

Then it is said that the contract was at an end before the nomination of Mr. Newth as a candidate. On October 19, being anxious to stand as a candidate for the office of town councillor, Mr. Newth applied to the finance, estates, and waterworks committee to be relieved from his tender or contract, and a resolution was passed, "that, subject to this minute being approved by the council, Mr. Newth be released from the estimate or contract referred to, as from this date." On October 24 he was nominated as a candidate. On October 30 the town council resolved that the minute of the finance,

(1) L. R. 9 C. P. at p. 20.

estates, and waterworks committee of October 19 be approved, adopted, and confirmed. It is argued that by this the contract was put an end to on October 30, as and from the 19th, on the ground that the ratification on the 30th of the minute of the 19th related back to the 19th, and that if that were so the contract would be determined as from the 19th, and there would not be any interest in the contract existing in the respondent on the day of his nomination, the 24th, because there was then no contract in existence. There was a considerable amount of argument as to this question of relation. I will not say that if Mr. Newth had not been a candidate the contract might not have been put an end to; but here there are considerations different from those applicable to what is done as between the parties themselves, for here there was a contract existing, so as to disqualify the respondent on October 24. Suppose some one had sued on the contract at some time between October 19 and 30. I do not wish to decide as to what would have happened in that event, but I desire to point out that there would be difficulties. Here we are not dealing merely with a contract as between the parties themselves. As pointed out by Wright J. in *Harford* v. *Linskey* (1), "An election petition is not simply a matter between the parties, but is of public concern." On October 24, the day of Mr. Newth's nomination, it was entirely uncertain whether the contract would be put an end to or not. The council might have declared on the 30th that they would not ratify the minute passed by the committee on the 19th. I am therefore of opinion that what passed between Mr. Newth and the council cannot put an end to the contract, so as to affect the rights of electors or of other candidates. Suppose, for instance, there were only one candidate nominated, as was the case in *Harford* v. *Linskey* (2), there would be no polling, and yet that one candidate might be disqualified should he be in Mr. Newth's position and the resolution of October 19 not confirmed. It is not necessary to go into the general law of ratification, or to consider the merits of the decision in *Bolton Partners* v. *Lambert*. (3) The

(1) [1899] 1 Q. B. 852, at p. 860. (2) [1899] 1 Q. B. 852.
(3) 41 Ch. D. 295.

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present case on this point is covered by *Bird* v. *Brown* (1), and the point is fully dealt with in the argument and the judgment of Cotton L.J. in *Bolton Partners* v. *Lambert.* (2)

There is one other point which I ought to mention. Mr. Newth had supplied some oil before October 19, and on October 24 he had not been paid for this oil. There was, therefore, then an existing debt from the council to him, and it is contended that this in itself constituted a contract which disqualified the respondent from being elected. This point was argued, but it is not necessary to decide it now. When it arises for decision it will be worthy of careful consideration, but if we were to express our opinion on it now anything that we might say would be merely obiter dictum. I therefore express no opinion on that question.

CHANNELL J. I am of the same opinion on all three points.

As to the first point I can entertain no doubt. It depends on the documents, and while there may in other and somewhat similar cases be documents of a like nature which would not be sufficient to constitute a contract, in the present case I am of opinion that there is quite enough. Here we have a proposal, an offer, and an acceptance, and it is quite clear that the subject-matter of the contract is the supply of particular articles for the period of twelve months; in other words the contract is for the quantity of those articles which the corporation may happen to require during the period.

The second point is one of real difficulty. It depends to a great extent on the case of *Bolton Partners* v. *Lambert.* (2) That case would be binding on this Court, but the decision was considered by the Judicial Committee of the Privy Council in *Fleming* v. *Bank of New Zealand.* (3) It was not necessary, as it turned out, for the Judicial Committee expressly to approve or disapprove of the previous decision, but, in delivering the opinion of the Judicial Committee, Lord Lindley, who had himself been a party to the decision in *Bolton Partners* v.

(1) 4 Ex. 786.

(2) 41 Ch. D. 295.

(3) [1900] A. C. 577.

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Channell J.

Lambert (1), said: "The above view of the case renders it unnecessary to consider any question of ratification, or to dwell on the decision of *Bolton Partners* v. *Lambert* (1) and its application to the facts of this case. The decision referred to presents difficulties; and their Lordships reserve their liberty to reconsider it if on some future occasion it should become necessary to do so." (2) In *Bolton Partners* v. *Lambert* (1) it was held that the ratification by the plaintiffs of an acceptance by an unauthorized agent of an offer by the defendant to purchase an estate related back to the acceptance, so as to constitute a valid contract for the sale of the estate, and to entitle the plaintiffs to specific performance, although before the date of the ratification by the plaintiffs the defendant had withdrawn his offer; that is, it was held that the subsequent ratification gave the plaintiff the same rights as if the agent had had a prior authority to accept the offer. Similarly in the present case any question arising after October 30 between the parties to the contract would have to be decided as if the contract had been put an end to on October 19, but that is only as between those parties. There are exceptions to the general rule as to ratification, and I think that in the case of a question affecting the rights of other parties, and arising prior to October 30, this general rule as to ratification would not apply. We must look at the real facts. In the present case the question is whether on October 24 the respondent was qualified for election or disqualified. It was then uncertain whether the act of the committee would be ratified, and the respondent had certainly not then completely got rid of his contract. In my opinion it is impossible to hold that he was not disqualified, for the words of s. 12, sub-s. 1 (*c*), of the Municipal Corporations Act, 1882, are wide enough to cover the case. The respondent at the date of his nomination had a share or interest in a contract with the town council, within the meaning of the section, and in any view was therefore disqualified for being elected.

I agree that it is not necessary to decide the third point

(1) 41 Ch. D. 295. (2) [1900] A. C. at p. 587.

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which has been raised, and that it is better not to express any opinion upon it.

Judgment for the petitioners.

Solicitor for petitioners: *C. T. Courtney Lewis, for W. Langley-Smith, Gloucester.*

Solicitors for respondent: *Ayrton, Biscoe & Barclay.*

P. B. H.

C. A.

1901

Feb. 12.

[IN THE COURT OF APPEAL.]

CHESSUM & SONS *v.* GORDON.

Practice—Judgment—Amendment—Error arising from Accidental Slip or Omission—Item omitted from Bill of Costs—Order XXVIII., *r.* 11.

In an action in the High Court the plaintiffs recovered judgment for an amount to be ascertained by a referee and costs. The referee made his award, and the plaintiffs took it up and paid the amount of his fees. Judgment was drawn up and entered for the plaintiffs for the amount found to be due by the referee, with costs to be taxed. The costs were taxed, and the taxing master's certificate was given, and the defendant paid to the plaintiffs the amount of the judgment and the taxed costs. Subsequently the plaintiffs discovered that the amount of the fees of the referee had been omitted from the bill of costs carried in for taxation. On an application that the defendant should be ordered to pay the amount of those fees, or such part thereof as should be allowed on taxation:—

Held, that there had been an error in the judgment arising from an "accidental slip or omission," which could be corrected under Order XXVIII., r. 11, by including therein the amount allowed on taxation in respect of the fees paid to the referee.

APPEAL from an order of Day J. at chambers.

In an action in the Queen's Bench Division the plaintiffs recovered judgment against the defendant for an amount to be ascertained by a special referee, with costs. The referee duly made his award, and gave notice to the parties that the award was ready and could be taken up on payment of 160*l.* 11*s.* 8*d.*, the amount of his fees. The plaintiffs paid the referee the fees and took up the award. By the award the sum found due to the plaintiffs was 3863*l.*, and thereupon the judgment was

drawn up and entered for the plaintiffs for that sum, with costs to be taxed. The plaintiffs accordingly carried in their bill of costs, which was taxed at 516*l.* 8*s.* 7*d.*, and the taxing master's certificate was given for this amount. The defendant paid to the plaintiffs these two sums of 3863*l.* and 516*l.* 8*s.* 7*d.* Subsequently the plaintiffs' solicitors discovered that the 160*l.* 11*s.* 8*d.* paid to the referee for his fees had been omitted from the plaintiffs' bill of costs, and they took out a summons before the judge at chambers asking that, notwithstanding the certificate of taxation of the plaintiffs' costs in the action, the defendant should be ordered to pay to the plaintiffs the sum of 160*l.* 11*s.* 8*d.*, being the amount paid to the special referee as his fees, or such amount as might be allowed as a proper payment, on the ground that such item was by error not included among the payments made by the plaintiffs in their bill of costs lodged for taxation.

Order XXVIII., r. 11, provides that "Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a judge on motion or summons without an appeal."

Day J. made an order that the referee's fees, amounting to 160*l.* 11*s.* 8*d.*, should be referred to the taxing master for taxation, and that his certificate might be amended, if necessary, on the ground that there had been a mistake in not including the referee's fees.

The defendant appealed.

Eustace Hills, for the defendant. The judge had no jurisdiction to reopen the judgment and refer the item of 160*l.* 11*s.* 8*d.* to the master for taxation. The costs upon a judgment are in contemplation of law part of the damages. The judgment in this case was a judgment for damages to be ascertained partly by the reference and partly by the taxation of costs before the taxing master. Those two sets of damages have been ascertained, and the judgment has been drawn up and entered, and the defendant has paid the amount. The judgment cannot be reopened merely because one item of damage has been omitted from the claim. It is analogous to the case of a plaintiff

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omitting an item of claim from his statement of claim, and recovering judgment with that item omitted. It could not be contended in such a case that the judgment could afterwards be reopened and amended so as to include that item of claim. By Order XLII., r. 17, the moment the taxing master's certificate was signed execution could have been issued, if the defendant had not paid the amount. It would be a great hardship on the defendant, after he has paid the amount of the judgment, to allow the plaintiffs to bring in another bill of costs and to issue execution on it. This would render the defendant liable to two executions in respect of the same judgment. This is not an application under Order LXV., r. 27 (41.), for a review of taxation, this item never having been before the taxing master, and moreover the time having expired for taking steps to review the taxation. The plaintiffs' solicitors omitted to include this item in their bill of costs, and, the judgment having been drawn up and perfected, the Court cannot now review or alter it: *Preston Banking Co.* v. *Allsup & Sons.* (1) The omission was the omission of the plaintiffs' solicitors, and that cannot now be corrected, as the judgment carries out the intention of the taxing master. The order of the learned judge was therefore wrong.

R. B. D. Acland, for the plaintiffs. The Court has jurisdiction at any time to correct a mistake or slip in a judgment, which, as drawn up, does not express the intention of the Court. The judgment at the trial was that judgment should be entered for the plaintiffs for an amount to be ascertained by a referee, with costs. By that judgment it was intended that the costs of the action and of ascertaining the damages, including the costs of the award, should be paid by the defendant. There was an accidental slip or omission within the meaning of Order XXVIII., r. 11, in not including the costs of the award in the bill of costs carried in for taxation. That being so, that rule allows the Court "at any time" to correct the error. In *Fritz* v. *Hobson* (2) Fry J., after the judgment in the action had been drawn up and entered, allowed the judgment to be corrected by giving the plaintiff the costs of a motion for an

(1) [1895] 1 Ch. 141. (2) (1880) 14 Ch. D. 542.

interim injunction, the plaintiff's counsel having by accident omitted to ask for those costs when the judgment was pronounced. The learned judge held that he had jurisdiction under the rule then in force, Order XLI. A, which is almost identical with the present rule, Order XXVIII., r. 11. That case was followed in the Court of Appeal by *Barker* v. *Purvis* (1), where the Court allowed a judgment to be amended, after it had been drawn up, there being an error in it owing to an accidental slip of the defendant in overstating the amount which he had paid for the plaintiff by way of interest. The Court there held that Order XXVIII., r. 11, gave the Court jurisdiction to correct the error in the judgment.

The case of *Preston Banking Co.* v. *Allsup & Sons* (2) was not a case of an accidental slip or omission at all. The order in that case accurately expressed the intention of the Court which made it. The Court there expressly pointed out that it was not a case where the order as drawn up did not express the intention of the Court, Lord Halsbury saying that if that were the case the Court must always have jurisdiction to correct it. In the present case there was clearly an accidental slip or omission in not including the referee's fees in the bill of costs. The judge had, therefore, jurisdiction to order the certificate of the taxing master to be amended by inserting therein the proper amount payable to the referee.

Eustace Hills, in reply. In both the cases of *Barker* v. *Purvis* (1) and *Fritz* v. *Hobson* (3) an error crept into the judgment, and the judgment was different from that which the Court intended. In both cases the judgment as drawn up did not carry out the intention of the Court; whereas here there is no error in the taxing master's certificate. The certificate carries out the intention of the master. There was only an error of the party in not bringing forward one item of claim, and Order XXVIII., r. 11, does not cover a slip or omission made by one of the parties, unless that omission or slip makes the judgment different from that which the Court intended.

(1) (1886) 56 L. T. 131. (2) [1895] 1 Ch. 141.
(3) 14 Ch. D. 542.

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A. L. SMITH M.R. This is an appeal from an order made by Day J. at chambers. There was an action in the Queen's Bench Division in which the plaintiffs recovered judgment against the defendant for a sum to be ascertained by a special referee, with costs. The referee assessed the sum payable to the plaintiffs at 3863*l.*, and judgment was drawn up and entered for the plaintiffs for the sum so assessed with costs to be taxed. The plaintiffs carried in their bill of costs for taxation, but by a pure slip they did not include in their bill of costs the sum of 160*l.* 11*s.* 8*d.* which they had paid to the referee when they took up the award. The master accordingly taxed the bill of costs as carried in and gave his certificate for 516*l.* 8*s.* 7*d.* The defendant paid the plaintiffs the two sums of 3863*l.* and 516*l.* 8*s.* 7*d.* The plaintiffs' solicitors shortly afterwards discovered that by a mistake the sum paid to the referee had not been included in the bill of costs carried in for taxation. A summons was thereupon taken out for an order that the defendant should pay to the plaintiffs the sum of 160*l.* 11*s.* 8*d.*, or such amount as might be allowed as a proper payment, and Day J. ordered that this sum should be referred to the taxing master for taxation, and that the taxing master's certificate should be amended on the ground that there had been a mistake in not including the referee's fees. From that order the defendant appeals to this Court. There can be no doubt that according to the justice of the case the plaintiffs ought to be paid this sum or whatever may be allowed as a proper sum upon taxation. It is satisfactory to know that no technical rule stands in the way of the Court making an order to that effect. In my opinion the case of *Preston Banking Co.* v. *Allsup & Sons* (1) does not touch the question before us. There was no question in that case of any "accidental slip or omission." The application was made to the Vice-Chancellor of the County Palatine of Lancaster to rehear an order which he had made with regard to the costs of an application before him, the order having been drawn up and entered. The applicant there wanted to reopen the order as to costs, and to have another order made in its place, not upon the ground that

(1) [1895] 1 Ch. 141.

the order as drawn up did not carry out the intention of the Court, but upon the ground that the original order was wrong and ought not to have been made. The Vice-Chancellor held that he had no jurisdiction to alter the order, and this Court affirmed his decision. That is a very different case from an application to correct a judgment or order which has by some accidental slip or omission been drawn up so as not to carry out the intention of the Court. Where there has been such a slip there is always power, either under the inherent jurisdiction of the Court or under the provisions of Order XXVIII., r. 11, to correct the error and set the matter right. Order XXVIII., r. 11, provides that "clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a judge on motion or summons without an appeal." In my opinion the omission of this item of 160*l.* 11*s.* 8*d.* from the bill of costs carried in for taxation was an "accidental slip or omission" within the meaning of the rule, and the error in the judgment arising therefrom can therefore be corrected "at any time." The error may be corrected even after the judgment has been drawn up and entered. There are two authorities which seem to me to be in point. The first is *Fritz* v. *Hobson*. (1) In that case a motion for an interim injunction had been adjourned to the trial of the action. At the trial the plaintiff succeeded, but his counsel forgot to ask for the costs of the adjourned motion. After the judgment had been drawn up and entered, Fry J. acceded to an application by the plaintiff to allow the judgment to be corrected so as to include therein the costs of the adjourned motion, holding that he had power to do so either under the liberty to apply impliedly reserved in the order on the motion, or under the liberty to apply expressly reserved by the judgment, or under the provisions of Order XLI. A, the terms of which are now reproduced in Order XXVIII., r. 11. The other case is *Barker* v. *Purvis* (2), a case in the Court of Appeal. There the judgment directed that the defendant should be at liberty to set off against the sum due to the plaintiff a sum of 453*l.* on account of interest which the

(1) 14 Ch. D. 542.
(2) 56 L. T. 131.

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defendant had paid on behalf of the plaintiff. The amount of 453*l.* was arrived at by an innocent misstatement by the defendant that he had paid this sum, whereas it was discovered, after the judgment was drawn up, that the defendant had by mistake overstated the amount. The Court allowed the judgment to be corrected under Order XXVIII., r. 11, holding that there was an error in the judgment which arose from an accidental slip of the defendant. Those two decisions seem to me to be distinctly in point. For these reasons I think that the order of Day J. was right and should be affirmed.

COLLINS and ROMER L.JJ. concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Mackrell, Maton, Godlee & Quincey.*
Solicitors for defendant: *Mellor, Smith & May.*

A. M.

Explained. HENDON CORPN. *v.* STANGER. [1948] 1 All E.R. 377.

C. A. 1901 *March* 13.

[IN THE COURT OF APPEAL.]

NASH *v.* HOLLINSHEAD.

Employer and Workman—Workmen's Compensation—"Factory"—Steam-engine used on Farm—Meal ground as Food for Stock—"By way of Trade or for Purposes of Gain"—Factory and Workshop Act, 1878 (41 *&* 42 *Vict. c.* 16), *s.* 93—*Workmen's Compensation Act*, 1897 (60 *&* 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2.

Where a workman, who was employed by a farmer on his farm to drive a movable steam-engine, for the purpose of working a mill for grinding meal intended to be used for food for stock on the farm, and not for sale, was injured by an accident arising out of and in the course of that employment:—

Held, that the workman was not employed on, in, or about a "factory" within the meaning of the Factory and Workshop Act, 1878, s. 93, and therefore was not entitled to compensation under the Workmen's Compensation Act, 1897, in respect of the injuries occasioned to him as before mentioned.

APPEAL from an award of the judge of the St. Alban's County Court under the Workmen's Compensation Act, 1897.

The respondent was a workman, who had been in the employment of the appellant, a farmer. The appellant had upon his farm a movable steam-engine, which was used for the purposes of threshing, chaff-cutting, and grinding meal. For grinding the meal a mill was used, the milling apparatus being connected with the fly-wheel of the engine by a band. It was the duty of the respondent to attend to the working of the engine. It was used for the purpose of grinding meal about once every three weeks. The meal was consumed as food by the stock on the farm. The appellant did not sell any of it, and carried on no other business than that of a farmer.

The respondent was engaged in attending to the engine, while being used for the purpose of grinding meal, when he met with the accident in respect of which he claimed compensation.

It was contended for the respondent before the county court judge that he was entitled to compensation as having been employed on a "factory" within the meaning of the Workmen's Compensation Act, 1897, s. 7, sub-s. 2.

The county court judge held that the contention of the respondent was correct, and therefore awarded him compensation.

W. Ellis Hill, for the appellant. The question whether the respondent was employed on a "factory" for the purposes of the Workmen's Compensation Act, 1897, depends upon whether the farm was a "factory" within the meaning of the Factory and Workshop Act, 1878. By s. 93, sub-s. 1, of that Act "non-textile factory" means (inter alia) "any premises wherein, or within the close or curtilage or precincts of which, any manual labour is exercised by way of trade, or for purposes of gain in or incidental to the following purposes, or any of them; that is to say, (*a*) in or incidental to the making of any article or of part of any article, or (*b*) in or incidental to the altering, repairing, ornamenting, or finishing of any article, or (*c*) in or incidental to the adapting for sale of any article, and wherein, or within the close or curtilage or precincts of which, steam, water, or other mechanical power is used in aid of the manufacturing

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process carried on there." Unless the place where the respondent was employed comes within that definition of the Factory and Workshop Act, 1878, the case is not within the Workmen's Compensation Act, 1897. It is submitted that a farm, on which a steam-engine is used as the engine in this case was used, is not a "non-textile factory" within that definition. Assuming for a moment that the grinding of meal could be said to come within the purposes mentioned in the section and to be a manufacturing process, it was not done here "by way of trade or for purposes of gain," for none of the meal was ever sold. The expression "trade" involves the idea of selling or manufacturing an article for the purpose of sale. See the passage from the judgment of Lord Mansfield in *Wells* v. *Parker* (1), quoted by Hannen J. in *Kent* v. *Astley*. (2) A person using the produce of his own land for its ordinary purpose does not thereby carry on a trade. The expression "purposes of gain" in the section means direct gain, not the indirect gain involved in the saving of labour by the use of the steam-engine for grinding the meal, or in the fitting of the stock fed on the meal for sale. A farm and farming operations are altogether outside the purview of the Factory Acts. The consequences of holding a farm on which a steam-engine is employed as in the present case to be a factory would be absurd. If the Factory and Workshop Act, 1878, applied to a farm, then the regulations mentioned in ss. 13, 14, as to hours of work, and time allowed for meals, in the case of women and children employed, and the provisions of s. 22 as to holidays would apply; the farmer would have under s. 75 to serve on the factory inspector the notice required by that section; the provisions of s. 76 as to naming a public clock, for the purpose of regulating the period of employment and time allowed for meals, would apply: the farmer would have to keep the registers, and send to the inspector periodically the extracts from them, mentioned in s. 77, and to affix at the entrance of the farm the notices, containing an abstract of the Act and other matters, which are mentioned in s. 78. These are all provisions totally inappropriate to the ordinary operations of

(1) (1785) 1 T. R. 34. (2) (1869) L. R. 5 Q. B. 19.

farming and the conditions of farming life. [He also cited *Ferrand* v. *Hallas Land and Building Co.* (1); *Rogers* v. *Manchester Packing Co.* (2)]

C. E. Fitch, for the respondent. It is submitted that under the circumstances the place where the respondent was employed comes exactly within the definition of a "non-textile factory" given by s. 93 of the Factory and Workshop Act, 1878, and therefore is a "factory" within the meaning of the Workmen's Compensation Act, 1897. The operation of grinding meal comes within the words "in or incidental to the making of any article," and was in this case carried on "for purposes of gain." The meal was to be used by the farmer in the course and for the purposes of the business which he carried on for gain. If he had not ground it himself, he would have had to pay to have it ground by some one else. It is immaterial that the gain is incidental to the business and not direct. If the case clearly comes within the definition of a "factory" given by the Factory and Workshop Act, 1878, then the Workmen's Compensation Act, 1897, will apply, notwithstanding the fact that some of the provisions of the Factory and Workshop Act, 1878, may not be very appropriate as applied to farming operations.

W. Ellis Hill was not called on to reply.

A. L. SMITH M.R. I cannot agree with the view taken in this case by the county court judge. The question involved is whether a farmer, who uses a steam-engine on his farm, as in the present case, carries on the business of a "non-textile factory" within the meaning of the Factory and Workshop Act, 1878. I may say, without fear of contradiction, that, before this case, it never entered into any one's head to suppose that he did so. It is now suggested for the first time that, ever since 1878, all the farmers in the United Kingdom who, in the course of their business, have used a steam-engine, for the purpose of grinding meal, or cutting chaff, or threshing out a rick have been carrying on the business of non-textile factories, and that, therefore, since 1897, the Workmen's Compensation Act applies; because s. 7 of that Act provides that the Act shall apply to

(1) [1893] 2 Q. B. 135. (2) [1898] 1 Q. B. 344.

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employment in a "factory," and that "factory" shall have the same meaning for the purposes of that Act as it has in the Factory and Workshop Acts, 1878 to 1891. The definition of the term "factory" is contained in s. 93 of the Factory and Workshop Act, 1878. It is contended that in the present case the respondent was employed on, in, or about a "non-textile factory" within that definition. To begin with, the expression "non-textile factory" seems rather incongruous as applied to a farm. The definition of "non-textile factory" in the section first of all enumerates specifically a number of places, and then provides that it shall mean "(3.) also any premises wherein . . . . any manual labour is exercised by way of trade or for purposes of gain in or incidental to the following purposes or any of them; that is to say, (*a*) in or incidental to the making of any article or of part of any article"—which latter words do not seem to me appropriate to the grinding of meal in the circumstances which existed here—"or (*b*) in or incidental to the altering, repairing, ornamenting, or finishing of any article, or (*c*) in or incidental to the adapting for sale of any article, and wherein . . . . steam, water, or other mechanical power is used in aid of the manufacturing process carried on there." Can it reasonably be said that the agricultural operation which was taking place in the present case came within that definition? I think not. In my opinion the whole definition is governed by the words "by way of trade or for purposes of gain," and I think that in this case those words are not satisfied, because the county court judge finds that the meal was not intended for purposes of sale but of feeding the stock on the farm. The meal was therefore clearly not ground by way of trade within the meaning of the Act. It was argued that, though the words "by way of trade" might not be applicable, the words "for purposes of gain" applied to this case; because, the meal being made more suitable food for stock by the process of grinding, the profit of the farmer on his stock was thereby enhanced. I think that the "gain" intended by the section is a direct gain, and that the Legislature, in using the words "for purposes of gain," contemplated the manufacturing of some article for the purpose of direct gain,

and not of such an indirect gain as that suggested, namely, the possible fattening of a bullock. It would require, in my opinion, a good deal of ingenuity, and straining of the words used, to bring a case like the present within the definition of a "non-textile factory." Our attention has also been called to a series of provisions with regard to a non-textile factory in the Act, the application of which to a farm would really produce a ludicrous result, as for instance the provisions of s. 13 with regard to hours of employment and time allowed for meals, of s. 22 with regard to holidays, of s. 75 with regard to notices to be given to the factory inspector, of s. 76 with regard to the setting up of a public clock for regulating the hours of employment, and of s. 78 with regard to affixing notices in the factory. Having regard to the terms of the definition given by s. 93 itself, and also to the scope of the provisions of the Factory and Workshop Act, 1878, to which our attention has been called, it is in my opinion impossible to hold that the place on which the respondent was employed was a "non-textile factory" within that Act. It follows that the case is not brought within the Workmen's Compensation Act, 1897, and that the appeal must be allowed.

COLLINS L.J. I am of the same opinion. I think that, even if the words of s. 93 were wide enough to embrace the present case, the result of holding that it comes within the Act is so inconsistent with the general purview of its provisions as inevitably to lead to the inference that the Legislature never intended that the Act should embrace such a case. It was on a ground similar to this that the case of *Ferrand* v. *Hallas Land and Building Co.* (1) was decided. It was argued there that it would be consistent with the words of the Public Health Act, 1875, s. 13, to say that a sewer was made for their own profit by the makers because it was made in order to enable them to get a higher rent for their houses; but the Court was of opinion that so to hold would lead to such anomalies, having regard to other provisions of the Act, that it never could have been intended that such a sewer should be

(1) [1893] 2 Q. B. 135.

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Collins L.J.

excluded from the operation of the Act. An argument of a similar nature is applicable in this case to the construction of the words "for purposes of gain." It was argued that the grinding of the meal was an operation incidental to the obtaining by the farmer of profit upon his stock—that is to say, that the farmer indirectly obtained a gain therefrom, and that the words "for purposes of gain" were wide enough to cover that operation. That may be so, but the context of the Act must be regarded. That context shews that the Act was intended to apply to places in the nature of manufactories, for it contains a series of elaborate provisions appropriate to such places, which throw a light on the purposes which the Legislature had in view in passing the Act. Sect. 93 of the Act, in defining non-textile factories, first of all specifically enumerates a number of places, all very dissimilar from a farm, and then uses the general words upon which the respondent in the present case relies. The provisions made by the Act are many of them of such a nature as it would be absurd to apply to every farming operation which may be carried on by means of steam or other mechanical power. There is also the further consideration, in addition to those arising from the context of the Act, that the Legislature must have been aware of the fact that farming operations were largely carried on by means of such steam-engines and also that farming was one of the largest industries in the country; and, that being so, it would be very extraordinary, if they had intended that the Factory and Workshop Act, 1878, should apply to it, that they should not have referred expressly to it among the places specifically mentioned in the definition clause, or introduced into the general words some expression that would distinctly cover it without any straining of the language. As the words now stand, it cannot be disputed that a farmer is not a trader, and it is only by straining the words "for purposes of gain" that the case can be brought within the definition. In view of these considerations I do not think that it is possible to hold that the Legislature contemplated such a case as this by the definition of a "non-textile factory" in the Factory and Workshop Act, 1878, and unless the case can be brought within that definition

it cannot be brought within the Workmen's Compensation Act, 1897.

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ROMER L.J. I agree. I have nothing to add, except to say that I express no opinion as to what the result might have been, if the operation of grinding the meal, as carried on in this case, had been carried on with a view to the sale of the meal as an article of commerce.

Appeal allowed.

Solicitors for appellant: *Heath & Hamilton, for Brigg & Remon, Harpenden.*

Solicitor for respondent: *H. W. Lathom, Luton.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1901 *March* 13.

LEECH *v.* LIFE AND HEALTH ASSURANCE ASSOCIATION.

Employer and Workman—Workmen's Compensation—Appeal—Refusal to order Payment by Insurers into Savings Bank—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 5, *sub-s.* 1, *Second Schedule, cl.* (4).

An appeal will not lie to the Court of Appeal under clause (4.) of the Second Schedule to the Workmen's Compensation Act, 1897, against the refusal of a county court judge to direct insurers to pay insurance money into the Post Office Savings Bank in accordance with the provisions of sub-s. 1 of s. 5 of the Act.

APPEAL against the refusal of the judge of the Dudley County Court to make an order under sub-s. 1 of s. 5 of the Workmen's Compensation Act, 1897.

In this case the appellant, a workman, had obtained an award of compensation against his employers under the Workmen's Compensation Act, 1897. The employers subsequently became bankrupt. An application was thereupon made on behalf of the appellant to the county court judge under s. 5 of the Act for an order directing the respondents, the Life and Health Assurance Association, with whom the employers had

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insured against liability under the Act, to pay the amount of the insurance money due into the Post Office Savings Bank in pursuance of the section.

The county court judge refused to make the order on the ground that there had been a breach of a condition in the policy by the employers, which had avoided it.

J. R. Atkin, for the respondents, the insurance company, took the preliminary objection that, the case not being within clause (4.) of the Second Schedule to the Workmen's Compensation Act, 1897, the appeal did not lie.

H. Tindal Atkinson, for the appellant, contra.

A. L. SMITH M.R. In this case the preliminary point is taken that the appeal will not lie to this Court. The question whether it will or not depends upon whether the case comes within clause (4.) of the Second Schedule to the Workmen's Compensation Act, 1897. The matter involved in this application is not any question as to the right to compensation as between the workman and his employers. The question whether compensation was payable under the Act, and, if so, to what amount, has been determined by the award. After that award was given, the employers became bankrupt, and an application was made to the county court judge on behalf of the appellant under s. 5, sub-s. 1, of the Act, for an order directing an insurance company, with whom the employers had insured against liability under the Act, to pay the amount due on the policy into the Post Office Savings Bank in the manner prescribed by that section. The county court judge refused to make an order as applied for by the appellant. Proceedings under s. 5, sub-s. 1, are not any part of an arbitration under the Act, but a matter altogether subsequent to the arbitration and award, the object of which is to secure to the workman the compensation awarded. The Second Schedule of the Act is headed "Arbitration." Clauses (1.), (2.), and (3.) of that schedule provide for settlement of any matter which under the Act is to be settled by arbitration, by an arbitrator, or by the county court judge, as the case may be. Clause (4.) provides

that "the Arbitration Act, 1889, shall not apply to any arbitration under this Act; but an arbitrator may, if he thinks fit, submit any question of law for the decision of the county court judge, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal." It is quite clear, in my opinion, that the matter here in question is not within that clause. The only appeal given by that clause is from the decision of the county court judge on a question of law, either on such submission, that is, the submission of a question of law by an arbitrator, or in any case where he himself settles the matter under the Act, that is the matter to be settled by arbitration under the schedule. It is not necessary now to go into the question whether the appellant has or has not a right of appeal to any other Court. It is clear that the only right of appeal from the county court judge to this Court is given by clause (4.) of the Act, and this case is not within it.

COLLINS L.J. I am of the same opinion. The Court of Appeal has no general jurisdiction in matters of this kind by way of appeal from the county court. A right of appeal from the decision of a county court judge to the Court of Appeal has been given in certain specified cases by clause (4.) of the Second Schedule to the Act. The question is whether this case is one of them. The clause only gives an appeal to this Court from the decision of a county court judge on a point of law submitted to him by an arbitrator appointed under clause (2.) of the schedule, or arising in a case where the matter is settled by himself under that clause. The subject-matter of the application made to and refused by the county court judge, and made to us by way of appeal from his decision, is clearly not a matter settled by an arbitrator or by the county court judge within the meaning of clause (4.) It is not a matter which has relation to the settling of the liability to, and the amount of compensation, but an ancillary matter which relates to securing

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payment of the amount of the compensation when settled by the award. It appears to me clear that this appeal will not lie.

ROMER L.J. concurred.

Appeal dismissed.

Solicitors for appellant: *Robbins, Billing & Co., for William Waldron, Brierley Hill.*

Solicitors for respondents: *Downer & Johnson, for Duffell, Birmingham.*

E. L.

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Jan. 11, 28; *Feb.* 22.

[IN THE COURT OF APPEAL.]

In re LAKE.
Ex parte DYER.

Bankruptcy—Breach of Trust—Trustee and Cestui que Trust—"Debtor and Creditor"—Voluntary Restitution on Eve of Bankruptcy—Dominant Motive for Gift—Fraudulent Preference—Appeal to the House of Lords, Leave to—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.

A trustee of a settlement who had misappropriated the trust fund, subsequently, on the eve of his bankruptcy, deposited in the trust box (which was then in his custody, as solicitor to the trust), but voluntarily and without any communication with his co-trustee or cestuis que trust, certain railway debentures belonging to him, accompanied by a memorandum admitting his breach of trust, expressing gratitude for kindness received from his cestuis que trust during his pecuniary difficulties, and stating that the deposit was made in order to make good the breach of trust. He was shortly afterwards adjudicated bankrupt:—

Held, by the Court of Appeal, reversing Wright J., that, on the memorandum, the bankrupt's dominant motive for the deposit was, not to prefer his cestuis que trust to his other creditors, but to repair the wrong he had done by his breach of trust, and therefore the transaction could not be set aside as a "fraudulent preference" within s. 48 of the Bankruptcy Act, 1883. Leave to appeal to the House of Lords was refused.

Whether the relation of "debtor and creditor" exists as between a defaulting trustee and his cestui que trust, *quære.*

Dictum of Lord Halsbury L.C., in *Sharp* v. *Jackson*, [1899] A. C. 419, 426, questioned.

THIS was an application by the present trustees of a settlement claiming to be entitled to certain railway bonds under these circumstances.

In July, 1898, B. G. Lake, a solicitor, and a member of the firm of Lake & Lake, was appointed one of the trustees of a marriage settlement dated April 5, 1869, and his firm acted as solicitors to the trust.

From November, 1899, to March, 1900, B. G. Lake was the sole partner in the firm of Lake & Lake. In January, 1900, there was in the hands of B. G. Lake or of his firm some 1250*l.*, being moneys belonging to the trust estate. This sum was misappropriated.

On May 7, 1900, B. G. Lake voluntarily, and without any previous communication with his co-trustee or his cestuis que trust, deposited in the trust box, containing the trust securities, four debentures of the Didcot, Newbury and Southampton Railway of the nominal value of 500*l.* each, and standing in his own name, accompanied by the following memorandum signed by him:—

"May 7th, 1900.—I have just learnt that there is something like 1000*l.* of Dyer's trust capital in the hands of the late firm. Had I known this I could not have permitted my daughter to have accepted their most generous help without which our Streatham home could not have been secured. As I am a trustee the debt is a personal one and one which I can properly make good out of my own assets. I therefore deposit 2000*l.* Didcot, Newbury and Southampton Railway 4 per cent. debenture stock as security for whatever may be found due. Its intrinsic value now is from 60 to 70 per cent., and I have quite recently been offered and have refused 40."

On May 18 the trust documents were removed from the custody of the firm, and the same day B. G. Lake's co-trustee became aware of the deposit and memorandum.

On June 2 a bankruptcy petition was presented against B. G. Lake, grounded on an act of bankruptcy committed by him on the previous 17th of May, and on June 27 a receiving order was made against him and adjudication followed.

On August 22 B. G. Lake retired from the trust when the present trustees of the settlement were appointed.

On September 21 B. G. Lake, at the request of the present trustees of the settlement, executed to them a transfer of the

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four debentures; but the railway company declined to register the transfer without the consent of B. G. Lake's trustee in bankruptcy, who refused to give his consent without an order of the Court.

Thereupon the settlement trustees applied to the Court for a declaration that the debentures in question were charged in their favour as security for the 1250*l.*, and to make good the breaches of trust committed by the bankrupt, and for an order on the trustee in bankruptcy to transfer the debentures to them accordingly.

It was admitted that throughout May, 1900, the bankrupt was hopelessly insolvent, and that he was aware of his insolvency, also that he had committed similar breaches of trust in some thirty other trust estates, and had attempted to make similar restitution in some cases but not in others.

The question was whether the deposit and memorandum constituted a fraudulent preference within s. 48 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). (1)

Vernon Smith, Q.C., and *F. E. Colt*, for the settlement trustees. The relation of debtor and creditor does not exist between a trustee and his cestuis que trust, and if a debtor on the eve of his bankruptcy voluntarily makes good trust funds he has misappropriated, it is not a fraudulent preference: *Ex parte Stubbins* (2); *Ex parte Taylor* (3); *New, Prance & Garrard's Trustee* v. *Hunting*. (4) No doubt *Ex parte*

(1) Sect. 48 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), enacts as follows:—

Sub-s. 1: "Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving such creditor a preference over the other creditors shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy."

Sub-s. 2: "This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt."

(2) (1881) 17 Ch. D. 58.

(3) (1886) 18 Q. B. D. 295.

(4) [1897] 1 Q. B. 607; affirmed [1897] 2 Q. B. 19.

Stubbins (1) and *Ex parte Taylor* (2) were questioned by the Court of Appeal in *Ex parte Ball* (3), and in *Sharp* v. *Jackson* (4) Lord Halsbury says that the relation of debtor and creditor does exist between trustee and cestui que trust; but that dictum was not necessary for the decision of that case, and the point is not referred to by the other Law Lords. But even if the relation of debtor and creditor does exist, the transaction can be supported by virtue of the higher right that subsists between trustee and cestui que trust: *In re Blackpool Motor Car Co., Ld.* (5) Lastly, on the evidence, it was not a fraudulent preference. The debtor acted under a sense of duty and to satisfy his conscience: *Ex parte Taylor* (2); and it makes no difference that he made restitution in some cases and not in others.

G. R. Northcote, for the trustee in bankruptcy. *Ex parte Stubbins* (1) and *Ex parte Taylor* (2) must now be taken to be overruled by *Sharp* v. *Jackson*. (4)

[WRIGHT J. Are there not two points—one the relation of debtor and creditor, and the other the relation of trustee and cestui que trust?]

None of the cases cited were decided on the fiduciary relation of the parties, and in all of them the debtor acted either under pressure or from fear of prosecution. There is nothing of the kind here. The evidence shews an intention to benefit a particular trust estate, and that the dominant motive is gratitude.

Cur. adv. vult.

Jan. 28. WRIGHT J., after stating the facts, continued:—It was argued for the trustees of the settlement, upon the authority of *Ex parte Taylor* (2) and *Ex parte Stubbins* (1), that s. 48 of the Bankruptcy Act, 1883, is inapplicable on the ground that the trustee and the cestui que trust do not stand in the relation of debtor and creditor. This doctrine was questioned by the Court of Appeal in *Ex parte Ball* (3);

(1) 17 Ch. D. 58.
(2) 18 Q. B. D. 295.
(3) (1887) 35 W. R. 264.
(4) [1899] A. C. 419, 426.
(5) [1901] 1 Ch. 77, 85.

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Wright J.

its soundness is denied by Lord Halsbury L.C. in *Sharp* v. *Jackson* (1); and I agree with Buckley J. in *In re Blackpool Motor Car Co., Ld.* (2), that it must now be taken that this objection is untenable. At any rate, in the present case the debtor, who was both trustee and solicitor to the trust, was a debtor for the 1250*l.*

It was further argued for the trustees of the settlement on the same authorities that a preferential payment by an insolvent trustee, made by him in order to repair a breach of trust, may be, and in this case ought to be, regarded as made by him not as debtor, but as trustee, and not with a view to prefer the cestui que trust as creditor, but with a view to satisfy the trustee's own conscience. This doctrine does not appear to have commended itself to the Court of Appeal in *Ex parte Ball* (3); but no further doubt is apparently thrown upon it in the House of Lords in *Sharp* v. *Jackson* (1); and the only question at present open is, What is the exact scope and limit of this doctrine? Of course, if the fund or property which the debtor hands over is itself impressed with a trust, the question does not arise: he is merely performing his legal or equitable obligation in handing it over. Next, if it is affirmatively proved that the debtor did not act with a view to prefer the trust estate, and acted merely to protect himself from penal or other consequences, that is settled to be no fraudulent preference. Again, if it is proved that he acted merely to satisfy his own conscience as a trustee, and not in the interest of the trust estate as a creditor, there is no fraudulent preference, if *Ex parte Taylor* (4) is good law. And possibly the doctrine is to be carried to this extent, that there may be a presumption that the trustee has acted for the satisfaction of his conscience as trustee, and not with a view to prefer the trust estate as creditor. But I do not find any authority which necessarily gives any further extension to the doctrine so as to justify under all circumstances a preference by the trustee of the trust estate. If it is established by evidence that he acted not in his own interest, nor from a sense of duty binding his

(1) [1899] A. C. 419.
(2) [1901] 1 Ch. 77.
(3) 35 W. R. 264.
(4) 18 Q. B. D. 295.

conscience as a trustee to prefer a particular trust estate or to prefer trust creditors over ordinary creditors, and still more if it is shewn that, having committed several similar breaches of trust, he, without circumstances creating any special duty in favour of a particular trust estate, gives it a preference with a view to prefer it over the others, that must, it seems to me, be sufficient to bring the case within the section. In the present case the evidence, and in particular the memorandum which I have read, seems to me to establish that the debtor acted with a view to prefer the particular trust estate from a motive of gratitude. The motive may not be decisive, but it is a guide to what was the dominant or efficient view. Here there was evidently an intention to prefer the cestui que trust from a motive of gratitude, not simply or mainly from a sense of duty to repair the particular breach of trust as a breach of trust. The motion must, therefore, be dismissed with costs.

H. L. F.

The settlement trustees appealed.

The appeal was heard on February 22, 1901.

Vernon Smith, *K.C.*, and *F. E. Colt*, for the appellants, used the same arguments and referred to the same authorities as in the Court below, and contended that the case was outside s. 48 of the Bankruptcy Act, 1883, altogether, it being one of trustee and cestui que trust, not of debtor and creditor. The observation by Lord Halsbury L.C. in *Sharp* v. *Jackson* (1)—to the effect that the relation between a cestui que trust and a trustee who had misappropriated the trust fund was "that of debtor and creditor"—was a mere obiter dictum, the point not having been argued.

[RIGBY L.J. How is a trustee a debtor? Can he be sued at common law? I do not see how he can be a "debtor," for the money he is fraudulently dealing with is, at law, his own money. No doubt he can be called upon to *replace* the money, but that must be by a suit in equity, not at law. Notwithstanding the high authority of the statement that has been referred to, I confess I do not understand it.]

(1) [1899] A. C. 419, 426.

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But the Lord Chancellor goes on to say that in the relation of trustee and cestui que trust there are higher considerations than those of debtor and creditor. What his Lordship apparently means is that although the relation of debtor and creditor does exist between a trustee and cestui que trust, yet s. 48 is not applicable to it. It is clear that in the present case the dominant motive of the bankrupt in the transaction was not a sense of gratitude, but to avoid exposure and consequent criminal prosecution.

Rawlinson, K.C., and *G. R. Northcote*, for the trustee in bankruptcy, adopted the argument urged on behalf of the trustee in the Court below. The bankrupt was not actuated by a sense of fear, but simply by a sense of gratitude. In *Sharp* v. *Jackson* (1) the deed by which the trustee sought in that case to make good his breach of trust contained very full recitals, stating that his object in making restitution was to shield himself from liability to legal proceedings: S.C. sub nom. *New, Prance & Garrard's Trustee* v. *Hunting* (2); and yet the House of Lords must be taken to have held that to be insufficient.

[VAUGHAN WILLIAMS L.J. If you compare the recitals in that deed with the cases, you will see that the draftsman shewed a remarkable knowledge of those cases.]

To hold that such a transaction as this can be sustained would lead to dangerous consequences, for the effect would be that, where various breaches of trust had been committed, the debtor, the trustee, could, on the very eve of bankruptcy, be able to make preferential gifts to his cestuis que trust.

RIGBY L.J. It is necessary to the case of the trustee in bankruptcy that he should make out that the governing motive in the mind of the bankrupt in the transaction in question was to prefer one creditor before others. That the trustee has not succeeded in doing. Now, was it the desire of the bankrupt to prefer a particular creditor over the rest of his creditors? I do not think the memorandum which has been relied upon as proving the affirmative of that is sufficient proof. It is admitted

(1) [1899] A. C. 419. (2) [1897] 1 Q. B. 607.

that the bankrupt might have been influenced by mixed motives. I suppose it is impossible to doubt that he had the wish to repair his breach of trust as trustee. That he had a desire to stand on a better footing with the cestuis que trust who had acted exceptionally well towards him when he had all the time been defrauding them in the most heartless manner is exceedingly probable; but upon this memorandum I come to the conclusion that his dominant motive was not fraudulent preference. Therefore, in my opinion, the case of the trustee breaks down and the appeal must be allowed, with costs both here and below.

VAUGHAN WILLIAMS L.J. I take the same view. If a man on the eve of bankruptcy makes a payment to a particular creditor, the presumption immediately arises that he makes that payment with the dominant view of giving a preference to that creditor over his other creditors. There is no need for any evidence that that view was expressed in so many words by the bankrupt: it is a presumption which would arise from the transaction. Now then, suppose that, in addition to that fact of payment on the eve of bankruptcy, there is also proof that the money so paid was paid by the bankrupt in order to make good a breach of trust: in that case it appears to me that the presumption arising from the fact of that payment being on the eve of bankruptcy would cease to operate: it would be negatived. There primâ facie it appears to me that, if you have no other considerations at all, the proper inference is that the presumption of an intention to prefer is dislodged, and the presumption is the other way. Of course that presumption would not be conclusive; one must look round and see what other circumstances there are. For instance, are the circumstances sufficient to lead to the conclusion that the bankrupt, although he was making good a breach of trust, did not do so in order to repair a breach of duty, but from a dominant motive to prefer? Some of the circumstances to be looked at would, of course, be the acts and words of the bankrupt at the time, though I have considerable doubt myself whether, strictly speaking, any evidence by the bankrupt with regard to his

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Vaughan Williams L.J.

motives or intentions, given by him long after the event, would really be admissible. One has to look at the circumstances at the time, and see from them what his dominant view was.

I therefore look at the circumstances of this case to see whether there is any occasion to get rid of the primâ facie inference that the bankrupt replaced the money which had been lost through his breach of trust, with the view of making good the wrong he had done, and not with the view of preferring a creditor. Now, I find nothing in the memorandum itself which leads me to form that conclusion. The circumstance stated in the memorandum is a circumstance to which I am bound to have regard: it is a circumstance which, no doubt, places the bankrupt under a sense of obligation; but I do not draw an inference from that that he was not influenced by a sense of duty, or by a sense of avoidance of shame, to replace the trust funds. On the contrary, the very fact that he or his daughter had received the kindness to which he refers was one which might quicken his sense of duty and his desire to free himself from the shame he felt by reason of his breach of trust; and, therefore, I am led to the conclusion that he did in fact make this transfer under a sense of his obligation to make good that breach of trust, and under a sense of the shame that would rest on him if he did not do so.

STIRLING L.J. I am of the same opinion. One of the elements to be taken into consideration in cases of this kind is the intention of the debtor, so far as it can be ascertained. That is laid down by Lord Esher M.R. in *Ex parte Taylor* (1), where he says (2): "You must also, as James L.J. said, take into account the man's own mind, and see whether, if he has done a very wicked and abominable thing, he may not afterwards have been doing that which, if he had a scrap of conscience left, he ought to have done—repair his former evil deed. If you come to the conclusion that that was the dominant motive in his mind, you must hold that he made the payment, not with a view of preferring the person to whom he made it, but in order to satisfy his own conscience."

(1) 18 Q. B. D. 295. (2) 18 Q. B. D. at p. 299.

To my mind, the document of May 7, 1900, bears strong evidence that that was the dominant motive in the mind of the bankrupt. It appears from that document that he or his daughter had, at the time of their misfortunes, received benefits from the persons to whom it was intended to be addressed; and it purports to shew that he had become aware for the first time that he or his firm was largely indebted to this trust. Any man who had any conscience at all would feel actuated by the strongest sense of shame at finding himself in such a position, and would therefore desire to put himself right by replacing the trust fund which he had misappropriated. Under these circumstances I am unable to take the view of the case that Wright J. did, and therefore, in my opinion, this appeal should be allowed.

Rawlinson, K.C., asked for leave to appeal to the House of Lords.

RIGBY L.J. The question in this case is merely one of fact; and, that being so, I do not think we ought to allow such a case to be taken to the House of Lords. We therefore refuse leave.

Appeal allowed.

Solicitors: *Peacock & Goddard; Lee & Pembertons.*

G. I. F. C.

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March 21.

THE GUARDIANS OF THE POOR OF THE WEST HAM UNION *v.* THE LONDON COUNTY COUNCIL.

Poor Law—Pauper—Settlement—Alteration of Area of Parish in which Settlement acquired—Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 *Vict. c.* 61)—*Poor Law Act*, 1879 (42 & 43 *Vict. c.* 54).

By an order of the Local Government Board made under the provisions of the Divided Parishes and Poor Law Amendment Act, 1876, as amended and extended by the Poor Law Act, 1879, a portion of a parish was added to and amalgamated with another parish in which a pauper had previously acquired a settlement:—

Held, that the order did not operate to destroy the parish to which the portion was added, and that the settlement of the pauper remained unaffected.

CASE stated by the court of quarter sessions for the county of London.

An appeal was brought to the quarter sessions by the guardians of the poor of the West Ham Union from an order of two justices of the county that the place of the last legal settlement of a pauper lunatic named Elizabeth Heritage was in the parish of West Ham, in the West Ham Union.

It appeared that Elizabeth Heritage was born in Stephenson Street, Canning Town, in the parish of West Ham, in the West Ham Union, on February 11, 1852, and that she resided in the said parish for about seventeen years until the month of August, 1888, in such manner and under such circumstances during the whole period of seventeen years and in each of such years as to render her irremovable from the parish in which such residence took place.

By an order of the Local Government Board, dated August 24, 1886, it was ordered as follows:—

"Whereas by the provisions of the Divided Parishes and Poor Law Amendment Act, 1876, as amended by the Poor Law Act, 1879, we, the Local Government Board, are empowered to deal by order with parts of divided parishes:

"And whereas the parishes of Wanstead and West Ham are included in the West Ham Union:

"And whereas the parish of Wanstead is a divided parish within the meaning of the said Acts, a certain part thereof being isolated and detached or nearly detached from the residue thereof, namely, all that part which is included in the borough of West Ham:

"And whereas a proposal having been made that the said part of the said parish of Wanstead should be separated from that parish and be amalgamated with some adjoining parish, or be otherwise dealt with under the said Acts, we caused local inquiry to be held after notice duly given as required by the Act first above mentioned, and report has been made to us thereon:

"And whereas it is expedient that the aforesaid part of the said parish of Wanstead should be separated from that parish and be amalgamated with the said parish of West Ham which it adjoins, and the Education Department have given their sanction thereto, in accordance with s. 4 of the Act first above mentioned, so far as such arrangement may affect the constitution of any school district:

"Now, therefore, in pursuance of the powers given to us by the statutes in that behalf, we hereby order as follows:—

"Art. 1. All that part of the said parish of Wanstead which is included in the borough of West Ham shall cease to be part of that parish, and shall be amalgamated with the said parish of West Ham.

"Art. 2. This order shall take effect on March 24, 1887, unless the same should in the meantime become provisional in pursuance of s. 2 of the said Divided Parishes and Poor Law Amendment Act, 1876."

The address at which Elizabeth Heritage resided as aforesaid was situated in the parish of West Ham as constituted previously to the date of the order, and not in any part of the parish of Wanstead.

Elizabeth Heritage left the parish of West Ham in the month of August, 1888, and did not thereafter acquire a settlement in any parish. She was afterwards found as a pauper

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lunatic in the hamlet of Ratcliff, in the Stepney Union, in the county of London, and was sent to the Claybury Lunatic Asylum belonging to the London County Council. On February 14, 1900, by an order of two justices for the county of London, she was adjudged under s. 290 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), to be chargeable to the county of London, and on May 15, 1900, the London County Council procured the order appealed from. The quarter sessions allowed the appeal, but on the application of the London County Council stated this case for the opinion of the Court.

Daldy, for the London County Council. The quarter sessions were wrong. They held that the effect of the order of the Local Government Board by adding part of Wanstead to West Ham destroyed all the settlements in West Ham. They misconstrued the effect of the decisions in *Reg.* v. *Inhabitants of Tipton* (1) and *Dorking Union* v. *St. Saviour's Union*. (2) The latter case only decided that, where after a settlement has been acquired in a parish that parish is divided by Act of Parliament into two or more parishes so that it ceases to exist as one entire parish, the settlement acquired in the old parish is gone. *Reg.* v. *Inhabitants of Tipton* (1) decided that a settlement in a parish gained by birth was a settlement in the whole parish as an entirety, and not in any particular part of the parish. If in the present case the pauper had been settled in Wanstead, no doubt the order of the Local Government Board would have destroyed her settlement; but can it be said that the mere increase in the area of a parish destroys all the existing settlements in it? To add two whole parishes together does not destroy either parish: *Reg.* v. *St. Martin, New Sarum* (3), and, therefore, to amalgamate part of one parish with another cannot destroy the parish with which such part is amalgamated.

J. C. Earle, for the West Ham Union. The quarter sessions were right. A pauper must be maintained wherever he becomes chargeable until a liability elsewhere is made out. No liability to maintain this pauper can be made out against the new

(1) (1842) 3 Q. B. 215. (2) [1898] 1 Q. B. 594.
(3) (1846) 9 Q. B. 241.

parish of West Ham as constituted by the Local Government order, because that new parish now contains what was formerly part of the parish of Wanstead, which was never under any liability to maintain this pauper. The case of *Reg.* v. *Inhabitants of Tipton* (1) is, therefore, precisely in point. This particular pauper was never settled in the present parish of West Ham as an entirety, but only in the old parish, which has been destroyed by the Local Government order. No order can be made removing a pauper to a district in which he was never settled, and thus imposing a liability on a district which was not previously liable to maintain him.

The case of *Reg.* v. *St. Martin, New Sarum* (2), turns on the construction of a particular statute, and does not affect this question.

Daldy was not called upon to reply.

DARLING J. I think in this case our judgment must be for the London County Council. What happened appears to have been this: that by virtue of the Acts of Parliament and of the order of the Local Government Board a part of the parish of Wanstead was added to the parish of West Ham, and was, in the words of the order, amalgamated with it. It was not a mere question of joining one to the other; but they were amalgamated so that they became one. The parish of West Ham from that moment exists with its old overseers, the only difference being that the authorities of West Ham have authority over the area of what was the old parish, and also over the portion amalgamated with it, which was part of Wanstead.

The pauper in question in this case had a settlement in West Ham, and it is said that that settlement is lost and gone by reason of the amalgamation with West Ham of this part of Wanstead, and for that proposition the *Tipton Case* (1) is cited. What happened in the *Tipton Case* (1) is stated exactly by Lindley M.R. in his judgment in the *Dorking Case* (3), where he says (4): "As I understand the law, it seems now to

(1) 3 Q. B. 215.
(2) 9 Q. B. 241.
(3) [1898] 1 Q. B. 594.
(4) [1898] 1 Q. B. at p. 599.

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Darling J.

be established that a settlement gained by birth is a settlement gained in a parish, and not in any particular part of that parish; and if that parish is subdivided, the old parish ceases to exist, and the settlement goes with it. No settlement in the portion made into a new parish can be implied in favour of a person who had acquired a birth settlement in the old parish, which has passed away." Now, the *Tipton Case* (1) has been followed with a good deal of reluctance by judges who have had to deal with and decide other cases. I do not myself in the least wish to say anything which would suggest that in my opinion it was not properly decided; but I think that this case does not come within the *Tipton Case* (1) at all. The reason why the pauper in the *Tipton Case* (1) lost his birth settlement was because he had been born in a parish which had passed away. This pauper was born in West Ham, and West Ham has not passed away. West Ham has been amalgamated with a small portion of another parish which has been joined on to it and amalgamated with it; but West Ham, in my judgment, still remains, and the parish in which the pauper was settled still remains although the boundaries of it have been enlarged.

The case of *Reg.* v. *St. Martin, New Sarum* (2), is this: the pauper gained a settlement in parish J., and afterwards by Act of Parliament that parish was united for all but ecclesiastical purposes with parish B. by the title of the united parishes of J. and B., and it was held that the pauper was settled in the united parishes. That would have been an authority, it seems to me, for this—that if all West Ham and all Wanstead parishes had been joined together with the title of the united parishes of West Ham and Wanstead, the paupers of both would have kept their settlements in the united parishes. But what has happened here is that a portion has been taken off Wanstead and amalgamated with West Ham. Has that destroyed the then existing settlements in West Ham so as to bring the case within the decision in *Reg.* v. *Inhabitants of Tipton*? (1) I do not think so. It may have destroyed Wanstead, and I do not say it has not. It may have destroyed the old parish of Wanstead, and by reason of the

(1) 3 Q. B. 215. (2) 9 Q. B. 241.

Tipton Case (1) the paupers who had acquired settlements in Wanstead may have lost their settlements; but although one may think that that is so, I do not see that that forces us to extend the doctrine which was reluctantly accepted by the judges in many cases, and which is laid down in the *Tipton Case* (1), and to say that a parish is destroyed, or has ceased to exist, when part of another parish is added to and amalgamated with it. It is quite enough to say that the *Tipton Case* (1) settled that if some portion was taken away from a parish, that parish was destroyed; but no decision yet says that adding something to a parish equally destroys it; and there is the authority of *Reg.* v. *St. Martin, New Sarum* (2), for saying that adding one parish to another does not destroy either of them.

It seems to me, therefore, that this case is not brought within the rule which has been laid down in the *Tipton Case* (1), and unless it comes within that rule the pauper is not deprived of her settlement. For that reason I think the London County Council succeed as against the parish of West Ham, where the pauper still remains, in my judgment, settled.

CHANNELL J. I am of the same opinion. It seems to me to come to this—that where settlements have been acquired in a parish, and that parish is destroyed, then the settlements are gone, unless the authority which has destroyed them has made some provision for the settlements. In this case the question which we have to consider is, What amounts to such a destruction of a parish as will produce that result? Now, it is decided in the *New Sarum Case* (2) that the adding to one parish the entirety of another parish does not destroy for this purpose the parish to which the entirety of another parish is added. What we have to say is whether adding to one parish, not the entirety of another parish, but a portion of another parish, destroys the first parish, and inasmuch as the adding of the entire parish would not destroy it, I do not see why it should be said that the adding of a part does so. Consequently,

(1) 3 Q. B. 215. (2) 9 Q. B. 241.

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we are not bound to say that the parish of West Ham has been destroyed, and we may follow the *New Sarum Case* (1), and say that it is more applicable to this case than the *Tipton Case*. (2) Upon that ground we are able to decide that the settlements are not gone.

Channell J.

With regard to the use of the word "amalgamation," I agree with what my learned brother has said. I think that for all purposes adding a portion of Wanstead to West Ham, and amalgamating that portion with West Ham, has not the effect of destroying the parish of West Ham with its existing settlements.

Appeal allowed.

Solicitors for London County Council: *W. A. Blaxland.*
Solicitors for West Ham Union: *Hillearys.*

A. P. P. K.

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April 1.

[IN THE COURT OF APPEAL.]

THE QUEEN ON THE PROSECUTION OF HAMILTON AND OTHERS *v.* COCKERTON.

Education—School Board—Provision of Science and Art Schools and Classes—Money raised by Rate—Limitation to Payment for Elementary Education—Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75)—*Elementary Education Acts*, 1870 *to* 1891—*Technical Instruction Acts*, 1889 *and* 1891 (52 & 53 *Vict. c.* 76; 54 & 55 *Vict. c.* 4)—*Education Code* (1890) *Act*, 1890 (53 & 54 *Vict. c.* 22).

It is not within the power of a school board to expend money raised by local rate upon any education other than elementary.

Decision of the Queen's Bench Division, [1901] 1 Q. B. 322, affirmed.

APPEAL from the judgment of a Divisional Court (Wills and Kennedy JJ.), reported ante, p. 322.

The application to the Divisional Court was for a rule nisi for a certiorari to remove into court three several certificates of disallowances and surcharges by the district auditor. By order of the Court the facts were stated in a special case, which is set

(1) 9 Q. B. 241. (2) 3 Q. B. 215.

out in the report of the case in the Divisional Court. The rule nisi was discharged. (1)

The prosecutors appealed.

1901. March 18. *Asquith, K.C.*, and *Llewelyn Davies*, in support of the appeal.

The Attorney-General (*Sir R. B. Finlay, K.C.*) and *H. Sutton*, for the auditor.

Danckwerts, K.C., and *Loehnis*, for the Corporation of London.

Lord Robert Cecil and *M. M. Macnaghten*, for the Camden School of Art and Science Corporation.

Cur. adv. vult.

April 1. The judgment of the Court (A. L. Smith M.R., Collins L.J. and Romer L.J.) was read by

A. L. SMITH M.R. This is an important case, for it affects the education of a large portion of the population in this country; and although the excellent arguments which have been addressed to us have ranged over a considerable area of ground, this has been occasioned not so much by reason of the magnitude of the real point in the case, but because of the discussion of the numerous Codes, Directories, and Acts of Parliament relating to education which have come into existence since the passing of Mr. Forster's Act of 1870 (33 & 34 Vict. c. 75), intituled "An Act to Provide for Public Elementary Education in England and Wales." The title is a good clue to what will hereafter be found in the Act. If the arguments had taken place shortly after its passing, in my opinion the case would have been comparatively short; and even now notwithstanding all that has happened during the thirty years since 1870, the same question still remains, which is the great question in the case—namely, what was the true construction of the Act when it received the Royal assent upon August 9 in that year. My brothers Wills and Kennedy in the Queen's Bench Division have upheld certain disallowances and surcharges made by an auditor upon the accounts of the School

(1) Ante, p. 322.

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Board of London in respect of payments made by that board, out of moneys obtained from ratepayers towards the cost of certain education. The learned judges have held that no Act has authorized these payments, and the School Board of London appeals. Before I come to the Act itself I must point out the condition of things in relation to two institutions which were then, and had been for some years, in operation in this country in and prior to the year 1870, for these institutions play an important part in the consideration of this case. There then existed at South Kensington a body corporate under the name of the Department of Science and Art, which corporation was for the furtherance of science and art, and generally to do any act or thing that might be conducive to the attainment of the objects for which the department was formed. Its funds were obtained by mean of a parliamentary grant, for which a distinct and separate vote was taken in Parliament. It issued periodically minutes of the matter to be taught in its schools. These minutes became known as the South Kensington Directory. There also existed a branch of the Privy Council called the Education Department. This was unincorporated, and carried on its work at Whitehall. Its funds were obtained by means of a parliamentary grant for which a distinct and separate vote was also taken in Parliament. It issued periodically minutes of matters to be taught in the schools to which it made grants, and these minutes became known as the Whitehall Code. The system of education prescribed by the Directory and the Code respectively is radically different. Although there are some few matters in the Code and Directory which somewhat overlap, no objection in this case is taken to the teaching by the school board with ratepayers' money of those matters which appear in the Code. It is the teaching of the education prescribed by the Directory with the ratepayers' money which is objected to. After the elaborate and exhaustive judgment of Wills J. it is wholly unnecessary, and would be mere waste of time, to again narrate in detail that which the learned judge has so clearly and adequately done as regards the essential difference between the Department of Science and Art at South Kensington with its Directory and

the Education Department at Whitehall with its Code. It is now sufficient for me to say that the South Kensington Department and the Whitehall Department have always been, and are, separate and distinct institutions. They have a different registration of scholars, different examiners, different grants, and different inspectors; and the South Kensington Department deals by means of its Directory with a high and very advanced system of education, while the Whitehall Department, by means of its Code, deals with an education of a lower and of a much less pretentious character. I may say, without going through the details of the South Kensington Directory, that no effort of imagination can describe the system of education therein set forth as elementary education; and for the purposes of this case, but only for this case, it is to be taken by admission of the Attorney-General that the education prescribed by the Whitehall Code is elementary education within the meaning of the Act of 1870. I am not asked in this case to say whether the Code embraces more than elementary education, but I may say it appears to me to embrace elementary education up to its high-water mark.

The concrete question now raised is—Can the School Board of London lawfully pay the expenses of schools and classes for teaching the education prescribed by the South Kensington Directory out of moneys of the ratepayers of London? Prior to the passing of Mr. Forster's Act in 1870, no ratepayer qua ratepayer was under any obligation whatever to contribute towards the expenses of any kind of education. No rates were applicable thereto. The moneys which the South Kensington Department and the Whitehall Department respectively received from Parliament, and which were respectively dealt with by them, were moneys obtained from the taxpayers by means of Imperial taxes, and not from ratepayers by means of local rates. The Act of 1870 for the first time set up school districts and school boards, and for the first time made the education of children between the ages of five and thirteen compulsory, and it, for the first time, enacted that rates should be levied in order to contribute to the expense of education. It is beyond dispute that if the School Board of London, or, indeed, any

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other school board (they are all corporations created by statute), is to justify the payment of the expense of education out of the money of the ratepayers, this must be done by producing some Act of Parliament, or Order in Council having the force of an Act of Parliament, which enacts that the ratepayers' money shall be levied and applied to that purpose. Neither a Code nor a Directory has any such force.

Now, what was the scheme which was brought into being by Mr. Forster's Act of 1870, whereby rates were to be applied to the cost of education, and what were the requirements of the State which then called forth the Act? Was it a scheme whereby the ratepayers should be called upon to contribute towards the expenses of the elementary education of the children in their districts, or was it a scheme that they should be called upon to contribute to the expenses of a high and advanced system of education such as that to be found in the Directory of the Science and Art Department at South Kensington, and were persons other than children to be educated at the expense of the ratepayers? What the State then required and what the consequent scheme of the Act was, can only be found by a study of the Act itself, and to the true construction of this Act I now come. In my opinion, if it were not for the definition given in s. 3 of the term "elementary school"—not, it will be noticed, of the term "public elementary school"—which definition Mr. Asquith for the school board very happily described as his sheet anchor, and to which if he could not ride he frankly owned that he must go to the bottom (and with this I agree), there would, in my opinion, for the reasons which will appear, have been but little to argue about. To clearly understand the object and scope of this definition, which, in my opinion, has been entirely misapprehended, I will first go through the Act without the definition to see whether in any part of the Act without the definition it can be said that the Act applies to anything else than the elementary education of children; for it is to the education which is to be found in the Act that the ratepayer is called upon to contribute, and to no other. In the first place, as before stated, the Act is intituled "An Act to Provide for

Public Elementary Education in England and Wales." This title is to be read as part of the Act itself: *Fielding* v. *Morley Corporation* (1), per Sir Nathaniel Lindley and Chitty and Collins L.JJ. It will be noticed it is not an Act to provide for public education in general, but for public elementary education in England and Wales, which is clearly something less than education in general. By s. 1 it is enacted that the Act may be cited as the Elementary Education Act, 1870. By s. 3 "'parent' includes guardian and every person who is liable to maintain or has the actual custody of any child." By s. 5 it is enacted that "there shall be provided for every school district a sufficient amount of accommodation in public elementary schools . . . . available for all the children resident in such district for whose elementary education efficient and suitable provision is not otherwise made, and where there is an insufficient amount of such accommodation, in this Act referred to as 'public school accommodation,' the deficiency shall be supplied in manner provided by this Act." It will be seen that this accommodation, whatever the word may mean, is to be provided for children for whose elementary education efficient and suitable provision is not otherwise made. Mark the words "children" and "elementary education." By s. 7, "Every elementary school which is conducted in accordance with the following regulations shall be a public elementary school within the meaning of this Act; and every public elementary school shall be conducted in accordance with the following regulations: (1.) It shall not be required, as a condition of any child being admitted into or continuing in the school, that he shall attend or abstain from attending any Sunday school, or place of religious worship. . . ." and any scholar may be withdrawn by his parent from religious observances. This is the section by which an elementary school becomes and is called a public elementary school—that is, a board school. A point was made on behalf of the school board, that, as the word "scholar" was used, the education in a board school was not confined to children. I do not agree; for the word "scholar" and the word "child" will be found indiscriminately used both in the

(1) [1899] 1 Ch. 1.

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Education Acts and in the Codes. By way of example, I would refer to s. 7 of the Act of 1870, to s. 8 of the Elementary Education Act of 1891, and to s. 17 of the Act of 1870, which two last sections must be read together, and to the Code of 1898, p. 18, in which infants are described as scholars. By s. 8 of the Act of 1870, the Education Department, that is Whitehall, is to cause returns to be made, and then to take into consideration every school, whether public elementary or not, and whether actually in the district or not, which in their opinion gives, or will when completed give, efficient elementary education to the children of the district. Again we find the words "elementary education to children," and the department to ascertain this is Whitehall and not South Kensington. By s. 17 every child attending a school provided by any school board, shall pay such weekly fee as may be prescribed by the school board with the consent of the Education Department—here again Whitehall—with power to the school board from time to time to remit the whole or any part of such fee in the case of any child when they are of opinion that the parent of such child is unable from poverty to pay the same. This section applies to a child and no one else except its parent. Sect. 30 provides for the formation of school boards, and they are by this section made bodies corporate. Sect. 37 deals with school boards in the metropolis, and I find no distinction in the Act, upon the point I am now inquiring into, between the School Board of London and the other school boards in the kingdom. Sects. 53 and 54 enacts how the expenses of a school board are to be paid. Sect. 53 is as follows: "The expenses of the school board under this Act shall be paid out of a fund called the school fund. There shall be carried to the school fund all moneys received as fees from scholars,"—this means the fees the board is entitled to receive under s. 17 from every child attending school (note the words scholar and child used indiscriminately)—"or out of moneys provided by Parliament, or raised by way of loan, or in any manner whatever received by the school board, and any deficiency shall be raised by the school board as provided by this Act." By s. 54 it is provided that "Any sum required to meet any deficiency in

the school fund, whether for satisfying past or future liabilities, shall be paid by the rating authority out of the local rate." Here is to be found for the first time in the history of education in this country an enactment applying rates towards defraying the expenses of education. By s. 67 the local authority once a year are to send to the Education Department, Whitehall, a return containing particulars with respect to elementary schools and children requiring elementary education in their district. By s. 74, which is under the heading of "Attendance at School," it is enacted that every school board, with the approval of the Education Department, Whitehall, may make by-laws for, amongst other, the following purposes: Requiring the parents of children of such age, not less than five years nor more than thirteen years, as may be fixed by the by-laws, to cause such children (unless there is some reasonable excuse) to attend school; and by a proviso to this section it is enacted that as regards a child between ten and thirteen years of age, such child need not attend school if one of Her Majesty's inspectors — that is, from Whitehall — certifies that such child has reached a standard of education specified in the by-law.

Having now gone through the Act apart from the definition of the term "elementary school" in s. 3, can it be said with any regard to truth that this Act deals with any education other than the elementary education of children? I think certainly not. In addition to what is set forth above, it should not be lost sight of that the Act of 1870 over and over again refers to the Education Department—that is, Whitehall—which for the purpose of this case is admitted to be the authority as to elementary education, and to elementary education alone, and it is admitted that, from first to last, the Act of 1870 makes no reference whatever to the Department of Science and Art at South Kensington with its high and advanced system of education. That the recipients of the education mentioned in the Act are children, and children only, cannot be denied, for I would ask who else can be found pointed at throughout the Act, to receive the education the Act prescribes, other than

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children. I now take the definition in s. 3 of the Act of 1870 of the term "elementary school." It is as follows: "In this Act the term 'elementary school' means a school or department of a school at which elementary education is the principal part of the education there given, and does not include any school or department of a school at which the ordinary payments in respect of the instruction, from each scholar, exceed ninepence a week." It is argued for the school board that this definition constitutes a statutory enactment whereby a board school or a department of a board school is empowered to give the highest and most advanced education of the South Kensington Directory at the ratepayers' expense, if the principal part of the education given in such school or department of such school is elementary. As to this contention the first observation to be made is that this definition of the term "elementary school" is not an enactment providing for the giving of any education at all, and much less an enactment that a school board in a public elementary school is thereby empowered to give the education prescribed by the Directory of South Kensington at the expense of the ratepayers. This seems to me to be an answer to the school board's contention. But, if the contention really be that it is a statutory enactment such as the board contends for, what is the meaning of the last part of the definition "and does not include any school or department of a school at which the ordinary payments in respect of the instruction from each scholar exceed ninepence a week"? I heard no reason given as to this by the learned counsel for the school board. It is common knowledge that prior to the Act of 1870 there was in this country a vast amount of education of all descriptions, elementary and non-elementary, carried on by schools supported by voluntary contributions, and, indeed, at the present day there still exists a considerable amount of such education. These schools have come to be known as voluntary schools. It was not the object of Mr. Forster's Act to destroy these voluntary schools and thus cast upon the rates their enormous cost, which was being provided for by voluntary contributions. What Mr. Forster's Act enacted was that the

school board should supply and the ratepayer should pay for the elementary education of the children if, taking into consideration every school, whether public elementary or not, and whether situated in the school district or not (s. 8), the elementary education which was then being provided was not sufficient. The object and meaning of the definition clause in my judgment is that, inasmuch as all kinds of education were then being taught in these voluntary schools, those outside schools only should come within the Act, and derive the benefits by way of grants and otherwise conferred by the Act, at which elementary education was the principal part of the education therein given; and, in addition, that those outside voluntary schools should only come within the Act if they were schools at which the ordinary payments therein in respect of the instruction, from each scholar, did not exceed 9*d.* a week apiece. That voluntary schools are referred to in the Act of 1870 as "elementary schools" is, in my opinion, apparent from, amongst others, s. 23, s. 12, sub-s. 2, s. 9, sub-s. 2, and s. 7. The object, meaning, and scope of the definition was to select out of these voluntary schools those which had these two attributes—that the principal part of the education was elementary, and that the scholars paid no more than 9*d.* apiece a week. If there were not this definition, I do not see why all voluntary schools could not have claimed the benefit of the Act, no matter what was their teaching, if they conformed to the requirements of the Act as regards religious teaching and otherwise. This definition, in my judgment, instead of being a statutory enactment that the highest education prescribed by the Directory should be taught by a board school at the expense of the ratepayers, is a definition whereby a limit is placed as to those voluntary schools which should become public elementary schools within the Act of 1870 and obtain its benefits; and, in my opinion, this definition has no such effect as that contended for on behalf of the school board. What I have above said as to the true construction of the Act of 1870 I will not repeat, for what I have already said upon the Act equally applies whether the definition in s. 3 is taken or not.

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I now come to the next Education Act which was passed—namely, the Elementary Education Act, 1873, by s. 2 of which it is enacted that: "This Act shall be construed as one with the principal Act" (that is, of 1870), "and the expression 'this Act' in the principal Act shall be construed to include this Act." In other words, the Act of 1873 is made part and parcel of the Act of 1870, which Act is to be read as if the Act of 1873 had been contained therein. Now what do we find in this Act of 1873? Sect. 13, in my opinion, is decidedly of importance. It enacts, "A school board shall be able and be deemed always to have been able to be constituted trustees for any educational endowment or charity for purposes connected with education, ... and to have and always to have had power to accept any real or personal property given to them as an educational endowment or upon trust for any purposes connected with education; provided that (1.) Nothing in this section shall enable a school board to be trustees for or accept any educational endowment, charity, or trust the purposes of which are inconsistent with the principles on which the school board are required by s. 14 of the principal Act to conduct schools provided by them." That is the section relating to the non-teaching of religion distinctive of any particular denomination. "And (2.) every school connected with such endowment, charity, or trust shall be deemed to be a school provided by the school board, except that nothing in this section shall authorize the school board to expend any money out of the local rate for any purpose other than elementary education." Here in this section, as it seems to me, is an emphatic declaration by the Legislature, which, be it remembered, forms part and parcel of the Act of 1870, that the school board is not to expend any money out of a local rate for any purpose other than elementary education. In fact, it enacts in short and positive terms that which is the whole tenor of the Act of 1870, as I have above endeavoured to shew. In my opinion, the many Acts which were subsequently passed down to and including the year 1891 have no real bearing on the point I have to decide, except that they shew that the Legislature was throughout dealing with the elementary education of children and nothing else. I will

very shortly go through them, for they have been referred to. In 1876 an Act was passed as to the employment and education of children called the Elementary Education Act, 1876. By s. 4 it enacted that it should be the duty of the parents of every child to cause such child to receive efficient elementary instruction in reading, writing, and arithmetic, and that in default he should be liable to a penalty. By s. 48, "A child in this Act means a child between the ages of five and fourteen years." In 1879 an Act, the Elementary Education (Industrial Schools) Act, 1879, was passed relating to the powers of school boards in relation to industrial schools. In 1880 the Elementary Education Act, 1880, was passed to make further provision as to by-laws respecting the attendance of children at school under the Elementary Education Acts. In 1885 an Education Act, the School Boards Act, 1885, was passed, which is foreign to this case. In 1890 an Act was passed for the purpose of making operative certain articles in the Code of 1890. This Act, the Education Code (1890) Act, 1890, by s. 1, enacted that "it shall not be required as a condition of a parliamentary grant to an evening school that elementary education shall be the principal part of the education there given, and so much of the definition of the term 'elementary school' in s. 3 of the Elementary Education Act, 1870, as requires that elementary education shall be the principal part of the education given in an elementary school shall not apply to evening schools." So that, although an evening school need not have elementary education as the principal part of its education to thereafter get a parliamentary grant (this has nothing to do with rates and moneys therefrom), yet, if the school was one at which the ordinary payment in respect of instruction for each scholar exceeded 9*d.* a week, an evening school, it would seem, is still left with that fetter, and will not get a parliamentary grant. This is the first Act to which my attention has been called in which an evening school is mentioned. By s. 3, sub-s. 2, of the Act of 1890, the Elementary Education Acts, 1870 to 1876, and the Elementary Education Act, 1880, and this Act may be cited collectively as the Elementary Education Acts, 1870 to 1890. In 1891 the Elementary Education Act, 1891, was

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passed to make further provision for assisting education in public elementary schools in England and Wales. By s. 1 a grant, called a fee grant, was passed by Parliament in aid of the cost of elementary education in England and Wales at the rate of 10*s.* a year for each child of the number of children over three and under fifteen in average attendance at any public elementary school in England and Wales not being an evening school; and by s. 13, sub-s. 1, the Act is to be construed as one with the Elementary Acts, 1870 to 1890; and (sub-s. 2) the Acts may be cited collectively as the Elementary Acts, 1870 to 1891. So much for the Acts ranging from 1870 to 1891; and I can find no indication in any of them that education other than that embraced in the Act of 1870 was to be taught by a school board at the expense of the ratepayers; and the education which a school board is by statute authorized to teach at that expense, in my judgment, is the same whether it be taught in the daytime or the evening. There is one other Act to which I must make reference, for it was much relied upon by the school board. It was not one of the Elementary Education Acts of 1870 to 1891, which form a Code of themselves, but is one of the Technical Education Acts, 1889 to 1891, which form a distinct Code of themselves. The Act is called the Technical Instruction Act, 1889 (52 & 53 Vict. c. 76). It is an Act to facilitate the provision of technical instruction. It is said that this Act contains a legislative recognition that the higher education of South Kensington, and not merely the elementary education provided by the Code, can be taught by school boards and be paid for out of rates. This Act, by s. 1, enacts that a local authority (this is not a school board, but a town or county council) may out of a local rate (this is not an education rate) supply or aid technical or manual instruction, but shall not out of the local rate supply the same to scholars receiving instruction at an elementary school in the obligatory or standard subjects prescribed by the minutes of the Education Department, Whitehall. The reason for this seems pretty obvious, because to the scholars in those standards the Education Department might well give elementary technical or manual instruction—that the local and school board authori-

ties were not to clash. Then comes a provision about making a local rate, by a local authority, which has nothing to do with a school board. It is there provided, s. 1 (*g*), that the rate to be raised in any one year by a local authority is not to exceed 1*d*. in the pound, and yet, according to the argument of the school board, it may levy for technical and manual instruction a rate to any amount it may require. Sect. 1, sub-s. 3, enacts: "Nothing in this Act shall be construed so as to interfere with any existing powers of school boards with respect to the provision of technical and manual instruction." As before stated, it seems to me that there may well be technical and manual instruction of an elementary kind which the school board may well teach as being elementary education. Then comes this—the conditions on which parliamentary grants may be made in aid of technical and manual instruction—i.e., to the local authority—shall be those contained in the minutes of the Department of Science and Art, the Department, as before shewn, with which the Elementary Education Act of 1870 has nothing to do. I have gone far enough in this Act to shew that it has nothing to do with the true construction of Mr. Forster's Act of 1870, and with just a reference to the novelty of the attempt to interpret one Act by another Act passed nineteen years afterwards, upon another and different subject-matter, I will conclude by saying that the Act of 1889 is not a legislative recognition of the right of the school board to teach the Directory education and make the ratepayers pay for it.

I now answer the questions put to me, but I will answer (1.) and (2.) together. (1. and 2.) I say it was not within the powers of a board as a statutory corporation to provide science and art schools or classes of the kind referred to in this case, either in the day schools or in evening continuation schools, out of the school board rate or school fund. (3.) That the rule nisi should not be made absolute in regard to any of the disallowances and surcharges, for in my judgment, for the reasons above given, they were correctly made by the auditor. I may add that, if the school board is to have the powers it seeks, these must be obtained by legislation, for the powers it desires

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to have do not exist in any statute or its equivalent already passed. This appeal must be dismissed.

Appeal dismissed.

Solicitor for prosecutors: *C. E. Mortimer.*

Solicitors for auditor: *Sharpe, Parker, Pritchards, Barham & Lawford.*

Solicitor for Corporation of London: *The City Solicitor.*

Solicitor for Camden School of Art and Science Corporation: *F. W. Hales.*

A. M.

1901
March 30.

[CROWN CASE RESERVED.]

THE KING *v.* HAMILTON.

Criminal Law—Practice—Sentence—Hard Labour—Common Law Forgery—"Any Cheat or Fraud punishable at Common Law"—Criminal Procedure Act, 1851 (14 & 15 *Vict. c.* 100), *s.* 29.

The prisoner was tried for the common law misdemeanour of forging and uttering writings with intent to defraud. He had fraudulently misappropriated money which he had collected and received for one Cobb. An order was made in a county court that he should render an account of the money received. He delivered papers in which the donors had entered their names and the amounts they had handed him. He had altered the entries so as to make it appear that smaller amounts had been given. It was not alleged that Cobb had been defrauded or prejudiced, except so far as it appeared that he had been deprived by the prisoner's conduct of the evidence to support his claim. On a case stated, reserving the question, whether there was power to pass a sentence of imprisonment with hard labour:—

Held, that, as the indictment charged only a common law forgery, without alleging that any one was thereby defrauded, the case did not come within the Criminal Procedure Act, 1851, s. 29, by which persons convicted of "any cheat or fraud punishable at common law" may be sentenced to hard labour.

CASE stated by the Common Serjeant of the City of London.

The prisoner, Frederick Thomas Hamilton, was tried at the Central Criminal Court on an indictment charging him in four counts with the common law misdemeanour of forging and uttering certain writings with intent to defraud. The material parts of the indictment are set out in the abstract hereto

annexed. The prisoner had in fact fraudulently misappropriated the greater part of moneys which he had collected and received for J. M. Cobb. An order was made in the county court in an action brought against the prisoner on behalf of Cobb that he should render an account of the moneys he had so received. He thereupon delivered, as true and genuine lists of the amounts received, papers on which the donors had entered their names and the amounts they had handed him. Before delivering these papers he altered the entries made by the donors, so as to make it appear that they had given much smaller sums, and so as, in some cases, to conceal the identity of the donors. It was not alleged in the indictment that Cobb had in fact been defrauded or prejudiced, except so far as it appeared by the third and fourth counts that Cobb was deprived by the prisoner's conduct of the evidence to support his claim. The jury having found a verdict of guilty, the Common Serjeant postponed judgment, and committed the prisoner to prison pending the determination of this case.

The question for the opinion of the Court was whether there was power to pass a sentence of imprisonment with hard labour: see 14 & 15 Vict. c. 100, s. 29. (1)

Abstract of indictment above referred to.

Frederick Thomas Hamilton on January 8, 1901, unlawfully, falsely, and deceitfully did make, forge, and counterfeit two writings purporting to be true lists of moneys collected by him for the benefit of John Milbourne Cobb with intent to defraud.

Second count. Unlawfully, falsely, and deceitfully did utter and publish as true two false, forged, and counterfeited writings purporting to be true lists of moneys collected by him for the benefit of John Milbourne Cobb with intent to defraud, he at the time he so uttered and published the same well knowing them to be false, forged, and counterfeited.

(1) By the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), s. 29, "Whenever any person shall be convicted of any one of the offences following, as an indictable misdemeanour; that is to say, any cheat or fraud punishable at common law; . . . . it shall be lawful for the Court to sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment."

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Third count alleged that Hamilton had collected and received money from subscribers in aid of Cobb, and that afterwards an action was brought on behalf of Cobb against Hamilton in the Brompton County Court for delivery of an account of said moneys, in which action Hamilton by order delivered to Cobb's solicitor two writings purporting to be subscription lists of moneys received by him.

That Hamilton, intending to injure, prejudice, and defraud Cobb, and to deprive him of his just rights in the action, unlawfully, falsely, and deceitfully did forge and alter the said lists in certain material particulars (setting out in what manner the lists had been altered) with intent to defraud.

Fourth count charged the uttering and publishing as true the writings mentioned in the third count with intent to defraud.

No counsel appeared for the prisoner.

Herman J. Cohen who prosecuted at the trial, now at the request of the Court, stated the case for the prosecution. It must be conceded that, in order to bring the case within the Criminal Procedure Act, 1851, s. 29, so as to enable the Court to pass a sentence of imprisonment with hard labour, it must be shewn that what the prisoner was indicted for, and convicted of, comes within the words "any cheat or fraud punishable at common law." The present case comes within those words.

[LORD ALVERSTONE C.J. To establish that proposition authority is required to the effect that the act of concealing a fraud by means of a forgery comes within the words of the section.

MATHEW J. What is a cheat?]

The answer to that question is to be found in Hawkins' Pleas of the Crown, Book I. cap. 71, sec. 1 ("of Cheats"): "And first it seemeth that those which are punishable at common law may in general be described to be deceitful practices in defrauding or endeavouring to defraud another of his known right by means of some artful device, contrary to the plain rules of common honesty." The present case comes within that definition, which is not inconsistent with those adopted in

2 Russell on Crimes, cap. xxxii. sec. i. p. 463, and sec. ii. p. 467, in 6th ed., and 2 East P. C. cap. 18, sec. 2, p. 818. The case may perhaps come within 24 & 25 Vict. c. 98, s. 38—*Reg.* v. *Riley* (1)—and possibly the prisoner might have been indicted under that section; but that does not make what he did any the less a cheat or fraud punishable at common law, if it would be so otherwise. [He also referred to *Rex* v. *Govers* (2); *Rex* v. *Minister and Churchwardens of St. Botolph, Bishopsgate.* (3)]

LORD ALVERSTONE C.J. We are much indebted to Mr. Cohen for calling our attention to such authority as there is bearing upon the point submitted for our decision. We have come to the conclusion that the prisoner in this case cannot properly be punished with hard labour. The offence with which he was charged was that of concealing a fraud by means of a forgery, and that is not a cheat or fraud punishable at common law. If a man obtained money by means of a common law forgery, he might be indicted and tried for a cheat or fraud in obtaining the money; but here the prisoner was indicted for a common law forgery, and it is sought to bring the case within s. 29 of the Criminal Procedure Act, 1851, by which any person convicted of any cheat or fraud punishable at common law may be sentenced to imprisonment with hard labour. At the time of the passing of that statute forgery at common law was a well-known offence. There is no allegation in this indictment that the prisoner obtained any money or other property by means of the forgery with which he is charged. For these reasons I am of opinion that the Common Serjeant would be wrong if he were to impose a sentence on the prisoner of imprisonment with hard labour upon a conviction on this indictment.

MATHEW, LAWRANCE, BRUCE, and RIDLEY JJ. concurred.

Question answered in the negative; Case remitted.

(1) [1896] 1 Q. B. 309. (2) (1755) Say. 206.
(3) (1763) 1 W. Bl. 443.

P. B. H.

1901
March 26.

In re TAYLOR.
Ex parte TAYLOR.

Bankruptcy—Annulment—Payment of Debts in Full—Application to annul Adjudication—Discretion to refuse Order—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 35, *sub-s.* 1.

Where a bankrupt, whose debts have been paid in full, applies, under the Bankruptcy Act, 1883, s. 35, sub-s. 1, for an order annulling his adjudication, the Court has discretion to refuse an order, if, having regard to the conduct of the bankrupt, it seems right to do so.

Therefore, where a bankrupt, in his statement of affairs, and on his public examination, concealed the fact that he possessed a large sum of money, and afterwards handed to the official receiver a portion of that money sufficient to pay his debts in full, with interest and expenses, and applied for an order annulling his adjudication, which was refused:—

Held, that the refusal was right.

APPEAL by the bankrupt from the refusal of the registrar of the county court at Greenwich to make an order annulling his adjudication in bankruptcy.

A receiving order was made against the bankrupt on September 26, 1899. On October 5 the bankrupt filed a statement of affairs, from which he omitted a sum of 500*l.* in bank-notes, which he had in his possession, nor did he disclose this sum on his public examination. Afterwards the bankrupt handed to the official receiver a sum of 450*l.*, part of the above-mentioned sum of 500*l.* This sum of 450*l.* was sufficient to pay all the creditors of the bankrupt in full, with interest and expenses. The bankrupt was not prosecuted. He applied, under s. 35, sub-s. 1 (1), of the Bankruptcy Act, 1883, for an order annulling his adjudication, which was refused, on the ground that he had been guilty of falsification of his statement of affairs, and of substantial concealment of assets, with regard

(1) 46 & 47 Vict. c. 52, s. 35, sub-s. 1: "Where in the opinion of the Court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full, the Court may, on the application of any person interested, by order, annul the adjudication."

to the above-mentioned sum of 500*l.* From this refusal he now appealed.

M. J. Muir Mackenzie, for the bankrupt, in support of the appeal. It is not disputed that the debts have been paid in full with interest and expenses, and that being so the bankrupt is absolutely entitled, under the Bankruptcy Act, 1883, s. 35, sub-s. 1, to an order annulling the adjudication. "May" in that section is almost, if not quite, equivalent to "must." There is no reported case of a refusal of such an order where the creditors had been paid in full. In *In re Duncan, Ex parte Official Receiver* (1), the bankruptcy was annulled (2), although it does not appear that the bankrupt had submitted himself to public examination, as the bankrupt in the present case has, but the point was not argued. [He also referred to *Alderman Backwell's Case* (3), commented on by Lord Blackburn in *Julius* v. *Lord Bishop of Oxford* (4); *Re Horniblow, Ex parte Official Receiver* (5); *Re Gyll, Ex parte Board of Trade* (6); *In re Hester, Ex parte Hester.* (7)]

S. G. Lushington, for the official receiver. Sect. 35 gives discretion to refuse an order, and the discretion was rightly exercised. The proper course is to refuse this application, and leave the bankrupt to apply for his discharge.

[He was stopped.]

WRIGHT J. I do not think that we can say here that the discretion of the registrar was wrongly exercised. He has a discretion, under the section, as to whether he will annul the adjudication or not. This debtor admittedly was guilty of two of the worst crimes which a bankrupt can commit—the crime of falsifying his statement, and the crime of substantial concealment of assets. Having committed these crimes, if he had come for his discharge he could not have got a discharge "unless," as the section (53 & 54 Vict. c. 71, s. 8, sub-s. 2)

(1) [1892] 1 Q. B. 879; reported only as to costs.
(2) [1892] 1 Q. B. at p. 882.
(3) (1683) 1 Vern. 152.
(4) (1880) 5 App. Cas. 214, at p. 241.
(5) (1885) 53 L. T. (N.S.) 155.
(6) (1888) 5 Morr. 272.
(7) (1889) 22 Q. B. D. 632.

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TAYLOR, *In re.* TAYLOR, *Ex parte.*

Wright J.

says, "for special reasons the Court otherwise determines," and none were suggested here. He could not have got his discharge, even by paying in full, unless there were some special reason. Why? Obviously because the Legislature thought that, when a debtor who had become bankrupt committed crimes like these in his bankruptcy, he ought to be punished by the stigma which attaches to an undischarged bankrupt, and by whatever disqualifications are attached to it. It is sought to get behind that by seeking to annul the adjudication. Sect. 35 gives a discretion, and it seems to me that it was rightly exercised. I do not say that if another application were made after a reasonable time the Court might not properly say that this unusual status had lasted long enough, but I should say certainly, so far as I am concerned, that it would be useless for him to apply until a period of something like five years from the bankruptcy had elapsed.

DARLING J. I agree, and I have nothing to add.

Appeal dismissed.

Solicitors for appellant: *Batchelor & Cousins.*
Solicitor for respondent: *Solicitor to the Board of Trade.*

P. B. H.

THE LEIGH URBAN DISTRICT COUNCIL, APPELLANTS; KING, RESPONDENT.

1901
Jan. 14, 19.

Highway—New or Substituted Highway—Formalities required by Highway Act, 1835*—Presumption of Compliance with, after Lapse of Time—Highway Act,* 1835 (5 *&* 6 *Will.* 4, *c.* 50), *ss.* 23, 84, 85.

Upon the hearing by a court of summary jurisdiction, under s. 8 of the Private Street Works Act, 1892, of objections to the proposals of an urban sanitary authority as to works to be executed by them under the Act, on the ground that the street was a highway repairable by the inhabitants at large, it appeared that in 1842, pursuant to a resolution of the vestry, a new road was substituted for an older public highway repairable by the inhabitants at large; the old highway was then closed, and from that date the new road had been used by the public as a highway. Upon one occasion the new road had been repaired by the surveyor for the parish, though it was uncertain whether in so doing he had acted in his capacity of surveyor. No evidence was given that the formalities required by s. 23 of the Highway Act, 1835, in the case of new highways, or by ss. 84 and 85 in the case of substituted highways, had been complied with:—

Held, that there was evidence upon which the justices might properly find that the new road was a highway repairable by the inhabitants at large, and that the formalities required by the Highway Act, 1835, might after the lapse of time be presumed to have been complied with.

CASE stated by justices for the county of Essex.

An information had been laid by the appellants' surveyor setting forth that the respondent had, in pursuance of s. 7 of the Private Street Works Act, 1892 (1), served on the appellants a written notice that he objected to the proposals of the appellants in regard to the levelling, paving, metalling, flagging, channelling, and making good of a street known as Rectory Grove, on the ground that it was (in whole or in part) a highway repairable by the inhabitants at large; the information further set forth that in consequence of the notice the appellants were precluded from making up Rectory Grove until the objection had been heard and determined by a court of summary jurisdiction in accordance with s. 8 of the Act. At the hearing the justices dismissed the information, holding as a fact that Rectory Grove was a highway repairable by the inhabitants at

(1) 55 & 56 Vict. c. 57.

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large, and directed the apportionment to be quashed or amended accordingly. The apportionment having been made, approved, and deposited under the authority of s. 6 of the Private Street Works Act, 1892, and the respondent having by his notice of objection as set out in the information taken objection thereto within the time limited by s. 7 of the Act, the only question at issue to be determined by the justices under s. 8 of the Act was whether or no Rectory Grove was in whole or in part a highway repairable by the inhabitants at large.

The evidence shewed that after March 20, 1836 (the date of the coming into operation of the Highway Act, 1835), that is to say, about the year 1842, the road on the north side of the rectory, now known as Rectory Grove, had been substituted for an older public highway, which ran in front or to the south of the rectory at Leigh, and was known as Chess Lane. The substitution was pursuant to a resolution at a vestry meeting held pursuant to notice dated January 8, 1842, for the parish of Leigh, whereby the meeting resolved to stop up the road in front of the rectory known as Chess Lane, and open a new road at the back agreeable to a plan produced in the vestry. Rectory Grove leads towards the same spot as that towards which Chess Lane formerly led. Soon after 1842 trees were planted in the northern hedge of Rectory Grove by the then rector of Leigh and the predecessor of the respondent, but there was no evidence of any repairs having been done to Rectory Grove by the then rector, or by any of his successors, or by the respondent. There was evidence of repairs on one occasion to Rectory Grove many years back by the then surveyor for Leigh, but whether as surveyor or otherwise did not appear. There was no evidence of repair by the surveyor beyond this, but there was also evidence that the Leigh Parish Council, the immediate predecessors of the appellants, had repaired the footpath in Rectory Grove. Rectory Grove had ever since 1842 been open to the general public. No surveyor's accounts were produced, nor was any evidence given as to any certificate having been enrolled or steps taken under s. 23 or s. 84 of the Highway Act, 1835.

On behalf of the appellants it was contended that no highway

made after the date of the coming into operation of the Highway Act, 1835, could be or become a highway repairable by the inhabitants at large until the steps mentioned in s. 23 or s. 84 of that Act had been taken; that Rectory Grove had been shewn to have been made since that date, and that as there was no evidence of the steps necessary under s. 23 or s. 84 of the Highway Act, 1835, having been taken, it could not now be a highway repairable by the inhabitants at large.

On behalf of the respondent it was contended that Rectory Grove was a highway within the definition in s. 5 of the Highway Act, 1835; that all highways were primâ facie repairable by the inhabitants at large; that such liability was displaced by s. 23 of the Highway Act, 1835, with respect to certain roads only, namely, a road or occupation way made or thereafter to be made by and at the expense of an individual or private person, body politic or corporate; that the onus of proving that Rectory Grove was a road so made, so as to displace the common law liability of the parish to repair it, was on the appellants; that the appellants had given no evidence of Rectory Grove having been so made; that in the absence of such evidence s. 23 did not apply to Rectory Grove, and the common law liability of the inhabitants to repair it remained unaffected by the Highway Act, 1835; that the terms of the resolution of the vestry in 1842 constituted evidence on the other hand that the opening of the new road and its making up was the act of the parish, and not of a private person, body politic or corporate; that there was evidence of repair by the parish surveyor, and clear evidence of repair to the footpath by the parish council.

The justices found as a matter of fact, "That Rectory Grove is a highway repairable by the inhabitants at large." The question for the opinion of the Court was whether there was evidence to justify the finding.

Macmorran, Q.C. (*R. Cunningham Glen* with him), for the appellants. The decision of the justices was wrong. This road having come into existence after the coming into operation of the Highway Act, 1835, the ordinary presumption that a highway dedicated to the public use is repairable by the public

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does not arise, and it is necessary to shew that all the legal formalities required by that statute before a road can become so repairable have been complied with. There was no evidence of compliance with the provisions of s. 23 or ss. 84, 85 of that Act, and the burden of proof of such compliance was on the respondent. The necessity of compliance with these formalities has been recognised by many decisions: *Reg.* v. *Dukinfield* (1); *Eyre* v. *New Forest Highway Board* (2); *Reg.* v. *East Hagbourne* (3); *Cubitt* v. *Maxse.* (4)

[PHILLIMORE J. In none of those cases was it suggested that the road was made by the parish.]

No; for two reasons: first, the parish as such cannot make a highway at all; secondly, the surveyor of highways is either an individual or a body corporate; he is really the agent for the landowner. The fact of repair by the parish, if the act of repair by the surveyor was really on behalf of the parish, is immaterial; the question is the liability of the parish to repair, and if there is no such liability the simple act of repair by the surveyor must be disregarded. The suggested repair by the parish council is not evidence of the liability of the inhabitants at large; the powers of a parish council as to highways and roads are strictly limited by s. 13 of the Local Government Act, 1894, and they have no power to adopt the provisions of other Acts of Parliament; they are not a highway authority at all.

Mattinson, Q.C. (*J. C. Earle* with him), for the respondent. There having been an old highway before the present highway was formed, the presumption is that this road is repairable by the inhabitants at large, and the onus of displacing that presumption is on the appellants. This is a substituted road, to which the provisions of s. 23 have no application; if, however, that section applies, the justices have not found that it has not been complied with; they only find that there is no evidence one way or the other; in that state of circumstances the Court should presume that there has been compliance with the section.

[PHILLIMORE J. referred to *Philipps* v. *Halliday.* (5)]

(1) (1863) 4 B. & S. 158.
(2) (1892) 56 J. P. 517.
(3) (1859) 28 L. J. (M.C.) 71.
(4) (1873) L. R. 8 C. P. 704.
(5) [1891] A. C. 228.

That decision shews that a legal origin for a faculty ought to be presumed, and in that case it was presumed, although there was a fact two hundred years earlier pointing to a non-legal origin. In *Williams* v. *Eyton* (1), which was a very similar case to the present, it was held that an order of two justices for stopping up a road, which was required by the General Inclosure Act (41 Geo. 3, c. 109), might be presumed to have been duly made, though there was no evidence of any such order. In the present case the presumption that s. 23 was complied with may well be made after a lapse of fifty-eight years. Further, s. 23 does not apply to this road at all, and the common law rule that a highway is primâ facie repairable by the inhabitants is applicable. The road is not within the mischief of s. 23, the object of which is to prevent public bodies being saddled with the repair of roads which they do not want; the vestry itself called the road into existence. Sect. 23 deals with a person who makes a road, not with a person who, as in the present case, allows the public to acquire a right over his land; it clearly does not apply to all roads, for in *Reg.* v. *Thomas* (2) it was held not to be applicable to a road made by turnpike trustees. [He also cited *Healey* v. *Batley Corporation.* (3)]

Macmorran, Q.C., in reply. The facts shew the road to have been made under s. 84, and there was no evidence that the requirements of that section and s. 85 have been complied with.

Cur. adv. vult.

Jan. 19. The following written judgments were delivered:—

PHILLIMORE J. In this case the appellant district council seeks to make the respondent liable for a proportion of the expense of converting Rectory Grove into a paved and made-up street, and the respondent contests his liability upon the ground that Rectory Grove was, before it was so made up, already a highway repairable by the inhabitants at large. There seems little doubt that the road called Rectory Grove

(1) (1858) 2 H. & N. 771; (1859) 4 H. & N. 357.

(2) (1857) 7 E. & B. 399.

(3) (1875) L. R. 19 Eq. 375.

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was laid out about the year 1842, and has ever since been used as a highway, and that when it was so laid out an older highway on the other side of the rectory grounds was closed. This older highway must be taken, upon the facts stated in the case, to have been one repairable by the inhabitants of the parish. The appellants say, however, that the new highway never became repairable by the inhabitants of the parish, because it was laid out after the passing of the Highway Act, 1835 (5 & 6 Will. 4, c. 50), and that since that Act a new highway only becomes so repairable if the conditions either of s. 23 of that Act (applicable to additional highways) or of ss. 84–92 (applicable to substituted highways) have been fulfilled; and that there is no proof that these have been fulfilled, or, alternatively, that there is proof that they have not been fulfilled.

I do not think it follows that in every case where an additional highway is laid out the conditions of s. 23 must be fulfilled. I think this is generally the case; but there are exceptions, of which *Reg.* v. *Thomas* (1) gives an instance, where the section does not apply. I think it only applies if the road is "made by and at the expense of any individual or private person, body politic or corporate," and it is clear that if the parish itself through its surveyor make a road it would not come under this section, as the later provisions of the section itself shew. It may be that a surveyor so employing the parish funds would be acting ultra vires; but I can quite conceive that in days when there was less centralization and no outside audit the making of a short piece of road, say, to cut off a loop, might be deemed to come within the powers of repair which a surveyor acting under the orders of the vestry would possess. I agree, however, with the contention of the appellants that it is more probable that this highway was intended to be a substituted one, to which ss. 84–92 would apply. If s. 23 applies, a certificate by two justices, which ought to be enrolled at quarter sessions, is a necessary condition before the highway can become repairable by the inhabitants. But I do not think that the actual enrolment is a

(1) 7 E. & B. 399.

necessary condition. If it be a substituted highway, the consent of the vestry, a certificate by two justices, an order of quarter sessions, and a further certificate by two justices of the good condition of the new road, which certificate ought also to be enrolled, are necessary conditions before the substitution can be accomplished and the old highway stopped. I am, however, not sure that an inchoate substitution made with the consent of the vestry might not, though no order of quarter sessions were obtained, operate as the making of a new road under s. 23, though, as the substitution was incomplete, the old highway would remain unclosed.

This being the law, the facts as found by the case are a resolution of the vestry expressed in language which looks as if the parishioners were rather actors instead of mere consenting parties, the de facto opening and using of the new highway and the de facto closing of the old one, acquiesced in apparently by everybody since 1842, and one act of repair of the new highway by a person who was surveyor, and who probably acted in his capacity of surveyor. Against this evidence in favour of the new highway being one repairable by the inhabitants is to be set the fact that no certificate of justices or order of quarter sessions is forthcoming. Upon this evidence the justices who have stated the case have found that Rectory Grove is a highway repairable by the inhabitants at large; and, if there is any evidence to support their decision, it must stand. I think there is; indeed, I think I should have found the same way.

Assuming that this case must fall under either s. 23 or ss. 84–92 (and I have stated that it may not come under either group of sections), all that is required by s. 23 is a certificate by two justices, which ought to be enrolled, but which, as I have said, need not be. It is quite possible that such a certificate may be lost. I can conceive its having been handed to the then rector as a sort of title-deed, and perhaps not handed on to his successors. If the case necessarily comes under ss. 84–92, no doubt there is much more difficulty in supposing the loss of an order of quarter sessions. But the duty of judges in matters of ancient possession, or of the exercise of public rights, is to presume in favour of long, open, and

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continuous usage. Many cases referred to in the course of the argument shew this, and others could be quoted.

The contention of the appellants is far-reaching. Not only is the new highway not repairable by the inhabitants, though they have used it since 1842, but the old closed highway ought to be open, and could now be opened, the owner of the soil who has enjoyed undisturbed possession of the soil of the old highway for the same period would have his property seriously injured, and the parishioners or the subsequent highway board (if there was one) and the present appellant district council itself would have been, and would be now, indictable for suffering the old highway to go out of repair. I am of opinion that our judgment should be for the respondent.

BRUCE J. I agree with my learned brother in the result at which he has arrived. There was, as it seems to me, sufficient evidence to justify the justices in finding that the road in question was repairable by the inhabitants at large. I think it is clear that the old highway, known as Chess Lane, was repairable by the inhabitants at large. I think the reasonable conclusion on the evidence is, that the new highway, known as Rectory Grove, was in the year 1842 by a resolution of the vestry substituted for Chess Lane under the provisions of s. 84 of the Highway Act, 1835. The difficulty arises because there is no direct evidence of a view by two justices of the peace and of the other formal steps necessary to be taken in order to comply with the provisions of s. 85 and the following sections of the Highway Act. But if those provisions were complied with, then it is clear that under s. 92 of the Highway Act the new highway became repairable by the inhabitants at large, just as the old highway was repairable. The question is whether in the circumstances the justices were justified in finding that the formal steps had been duly taken.

It is clear that since 1842 the old highway has been stopped up and has ceased to be used, and the new highway has in fact been substituted for it. It is, I think, a very violent presumption that the public should acquiesce in the stopping up of the old road unless it were done in a regular way, and I

think the justices may well have presumed that the certificate of the justices was duly granted and the formal proceedings duly taken to comply with the provisions of s. 85. After so long a period a certificate of the justices may have been lost, and although it is difficult to presume that the certificate was enrolled amongst the records of quarter sessions, yet the provision as to enrolment is apparently directory only, and the neglect to enrol would not affect the validity of the proceedings: see *De Ponthieu* v. *Pennyfeather* (1), decided under an earlier Act. It is further difficult to presume that the order of quarter sessions was duly made; but I think that the dictum of Wightman J. in *Williams* v. *Eyton* (2), that the inclosure of a road for a period of about twenty-eight years is sufficient to warrant the Court standing in the place of a jury in presuming that everything was rightly done and that an order of two justices was obtained, affords a guide to assist us to a conclusion. In the present case the period of time was much longer than twenty-eight years—a little short of sixty years—and although the facts are not the same as the facts in *Williams* v. *Eyton* (3), yet the principle laid down in the dictum I have quoted appears to me to apply.

There was further evidence that the new road had been repaired by the surveyor of the district. It did not appear in what capacity the surveyor repaired the road, but in the absence of evidence I think it would be unreasonable to presume that the surveyor had paid for the expenses of repair out of his own pocket.

For these reasons I am of opinion that we cannot disturb the finding of the justices.

Appeal dismissed.

Solicitor for appellants: *G. E. Wright-Motion.*

Solicitors for respondent: *Kingsford & Dorman, for Gregson, Southend-on-Sea.*

(1) (1814) 5 Taunt. 634; 15 R. R. 603. (2) 4 H. & N. 357, at p. 358. (3) 2 H. & N. 771.

W. J. B.

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Feb. 8, 9.

FITZPATRICK *v.* EVANS & CO.

Employers' Liability Act—"*Workman*"—*Person Employed in Coal Mine by Contractor*—*Contract by Workman with Mine-owner to obey Regulations*—*Liability of Mine-owner*—*Coal Mines Regulation Act*, 1887 (50 & 51 *Vict.* c. 58)—*Employers' and Workmen Act*, 1875 (38 & 39 *Vict.* c. 90), s. 10—*Employers' Liability Act*, 1880 (43 & 44 *Vict.* c. 42), s. 8.

By s. 8 of the Employers' Liability Act, 1880, the expression "workman" means any person to whom the Employers and Workmen Act, 1875, applies; and by s. 10 of the Act of 1875, a "workman" means "any person who, being a labourer . . . . miner, or otherwise engaged in manual labour, ... has entered into or works under a contract with an employer, whether the contract be . . . . express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour."

The owners of a colliery entered into an agreement with a contractor by which the latter contracted to sink and wall a shaft in the colliery. One of the men employed upon the work by the contractor and paid by him was fatally injured by an explosion of gas in the mine. The deceased had, in common with all the men employed by the contractor, signed the "record book" kept by the colliery owners, by which, in consideration of being employed at the mine, he became bound to observe the regulations and conditions laid down for the safety of the mine and for the guidance of the persons employed there. The administrator of the deceased having brought an action against the colliery owners under the Employers' Liability Act, 1880, to recover damages for his death:—

Held, that the signature of the conditions by the deceased did not create a contract of service between himself and the colliery owners; that the deceased was therefore not a "workman" who had entered into or worked under a contract with the colliery owners as his employers within the meaning of s. 10 of the Employers and Workmen Act, 1875, and that the Employers' Liability Act, 1880, did not apply.

APPEAL of the defendants from a judgment of the deputy judge of the county court of Lancashire holden at St. Helen's. The action, which was tried with a jury, was brought under the Employers' Liability Act, 1880, and the Fatal Accidents Act, 1846, to recover damages for the death of the plaintiff's son, John Fitzpatrick, who had been killed during sinking operations in a pit belonging to the defendants, who were colliery proprietors near St. Helen's.

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The defendants had contracted with a man named Morris, a "sinker," by which Morris agreed to sink and wall the shaft of a pit in the colliery. The deceased was employed by Morris upon the work as a sinker at wages of 6*s*. a day, which were paid by Morris. The shaft which was being sunk under the contract was at the bottom of a working shaft, and during the sinking operations naked lights were used, this being the usual custom in such operations, but for the convenience of the sinkers during their work the defendants provided a partial electric installation to give additional light. On the day of the accident, while the sinkers, including the deceased, were at work, there was a sudden upheaval at the bottom of the shaft, followed by an escape of gas which ignited on coming in contact with the nearest lights, and the deceased was so badly burned that he died from the result of his injuries.

It was admitted by the defendants that the deceased had signed the "record book" kept at their colliery of persons employed there upon the conditions mentioned in the book, which were as follows:—

"1. The persons directly employed at the colliery are engaged for an indefinite period determinable upon fourteen days' notice. The employed undertake to work on each working day, Saturday included (if required), and the employer undertakes to employ them on such days, except in the event of accident, repairs, breakdown, or bad trade. The wages to be paid weekly.

"2. This contract shall remain in force and operate as a contract between the workman and the owner for the time being of the colliery so long as the workman continues to be employed at the colliery, notwithstanding any change in the members for the time being constituting the employers' firm.

"3. All usual customary terms and regulations which obtain or exist with respect to the employment of workmen and all other persons employed in the colliery, whether expressed in writing or not, shall be and remain in full force and effect as part of the contract between the employer and the workman or other persons employed.

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"*For Miners and Contractors only.*

"4. Every miner and contractor employed at the colliery shall, upon engaging any drawer, workman or other person, require such drawer, workman or other person to obtain a copy of these conditions from the officer whose duty it is to provide such copies, and inform such drawer, workman or other person that they are the conditions under which persons are employed at the colliery, and such miner, drawer or workman and other persons respectively shall be bound by such conditions.

"*For Drawers and Persons working under Contractors only.*

"5. Every drawer employed by any miner, and every workman or other person employed by a contractor at the colliery, shall at the request of such miner or contractor obtain a copy of these conditions from the officer whose duty it is to provide such copies, and such drawer, workman or other person shall in consideration of being employed at the works be bound, both as between himself and the miner or contractor and between himself and the owner, by the terms of these conditions."

At the trial Morris, who was called as a witness, said that if the certificated manager of the mine had given him an order relating to the work he would have obeyed it, and would have expected his own workmen to do so.

The judge left to the jury the question (among others) whether the deceased was a workman in the employment of the defendants, which they answered in the affirmative; they also found that the defendants had been guilty of negligence, and assessed the damages at 50*l.*, for which amount the judge gave judgment. The defendants gave notice of motion on appeal upon the grounds that the deceased was not a workman in the employment of the defendants within the meaning of s. 8 of the Employers' Liability Act, 1880, and s. 10 of the Employers and Workmen Act, 1875, and that so far as it was a question of fact there was no evidence to go to the jury that he was in the employment of the defendants.

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Ruegg, K.C. (*S. H. Leonard* with him), for the defendants. There was no relation of master and servant between the deceased and the defendants. The case is concluded by the decision in *Marrow* v. *Flimby and Broughton Moor Coal and Fire Brick Co.* (1), the only difference being that in that case there had been no such conditions signed by the workman as were signed in the present case. The signature of those conditions did not constitute the relation of master and servant; the deceased remained the servant of Morris, the contractor. The Coal Mines Regulation Act, 1887, contemplates the exercise of great control by colliery owners over persons actually doing work in a mine without the relation of master and servant being thereby necessarily created. The only conditions in which the defendants are referred to as employers are those in clauses 2 and 3 of the record book; the conditions in clauses 4 and 5, which affect persons not directly employed by the defendants, do not constitute employment in the sense of personal service. The deceased was not the servant of the defendants, and no action will lie under the Employers' Liability Act, 1880.

Montague Lush, for the plaintiff. The decision was right. The defendants had the sole control of the mine, and the very object of their insisting upon the conditions being signed was to establish a common employment of all the persons working in the mine, whether directly employed by them or not. The relation of master and servant existed between the defendants and the deceased, and is not affected by the fact that the deceased's wages were paid by Morris; the proper test to apply is not the payment of wages, but the exercise of control over the workman. It is clear that the defendants had entire control over the employment of the deceased; the conditions which the latter signed obliged him to obey the orders of the defendants, and under clause 5 he was compelled to sign the conditions in consideration of being employed at all in the mine. *Marrow* v. *Flimby and Broughton Moor Coal and Fire Brick Co.* (1) is distinguishable; in that case the manager could only dismiss the workman under the provisions of the Coal Mines

(1) [1898] 2 Q. B. 588.

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Regulation Act, 1887; in the present case the manager had power to dismiss the deceased at will. Apart altogether from the question of a special contract of service arising from the signature of the conditions, the evidence of Morris that he should expect his men to obey the manager's orders was evidence from which the jury might properly infer a contract of service between the deceased and the defendants.

[He also cited *Morrison* v. *Baird & Co.* (1); *Brown* v. *Butterley Coal Co.* (2); *Levering* v. *St. Katharine's Dock Co.* (3); *Ruth* v. *Surrey Commercial Dock Co.* (4); *Wiggett* v. *Fox.* (5)

Ruegg, K.C., in reply.

WILLS J. The question we have to decide is by no means easy, and the case is perhaps upon the border-line. No substantial distinction can be drawn between the present case and *Marrow* v. *Flimby and Broughton Moor Coal and Fire Brick Co.* (6) except that which has been argued on behalf of the plaintiff. The real question is whether there was any evidence to go to the jury that the relation of master and servant existed between the defendants and the deceased. The only piece of parol evidence relied upon was the answer given by Morris, the sub-contractor, that if the manager of the mine had given him an order he should have obeyed it, and should have expected his workmen—the men under him—to obey it also. I think that that evidence, if properly looked at, really comes to nothing. It is exceedingly vague, and the deputy county court judge did not go on to ask the witness if there were any instance in which any order had been given which he or his workmen had obeyed or disobeyed. The question was put in the vaguest way, and probably the same answer would have been given by any sub-contractor under any ordinary building contract, in respect of some of his workmen, as to the orders of the building owner or the architect. It is a constant practice in contracts of this kind to reserve power to the

(1) (1882) 10 R. 271.
(2) (1885) 53 L. T. 964.
(3) (1887) 3 Times L. R. 607.
(4) (1891) 8 Times L. R. 116.
(5) (1856) 11 Ex. 832.
(6) [1898] 2 Q. B. 588.

persons who are interested in the work which is being done to interfere more or less and to control to some extent both what is to be done and the manner of doing it. In such cases it cannot be supposed that the relation of master and servant exists. In my opinion, unless a great deal more is known than appears from the answer of Morris, there is no evidence of anything more than his expression of opinion that if directions were given to him as to what work should be done, or in what order it should be done, he would think it wise and proper to obey them; and, if he obeyed them, of course he would expect his men to obey them also. I do not think that an opinion of that sort is any evidence at all that Morris was the servant of the mine-owners, or that the men under him were either. There is no other parol evidence of the existence of the relation of master and servant.

We are therefore driven to the conditions in the record book signed by the deceased, and must look at them as a whole. The only part which is directly applicable to a person in the position of the deceased is clause 5, which is for "drawers and persons working under contractors only": this means persons who are working for sub-contractors, as the deceased is entered upon the books as doing in the present case—working for contractors and not for the mine-owners. Under that clause the deceased and all other persons in his position were affected by these conditions, because by clause 4 the contractor is to cause them to procure copies of the conditions at the office. When, therefore, they enter into the contractor's employment, the men must be presumed to know the conditions, and, in consideration of being employed at the work, to be bound as between themselves and the mine-owners by the terms of the conditions. That undoubtedly establishes a privity of contract between the mine-owners and the workmen of the contractor, and, as is pointed out by Rigby L.J. in *Marrow* v. *Flimby and Broughton Moor Coal and Fire Brick Co.* (1), that makes all the special rules which he referred to as germane to that case binding between the mine-owners and every workman working in the mine. I can entertain no doubt that there was in

(1) [1898] 2 Q. B. at p. 605.

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the present case a contract between the deceased and the mine-owners: the only question is as to the nature of the contract.

Now, in consideration of being employed, which is ample consideration, because the mine-owners could prevent his being employed by the sub-contractor, if they chose, the workman must be bound by the rules laid down for the safety of the mine and for the guidance of persons employed there. Clause 3 is material, and shews that such persons are to be bound by the usual and customary terms and regulations which exist in the colliery, whether in writing or not, and that these terms and regulations are to remain in full force as part of the contract. The only question is whether, because he was bound to observe the conditions and terms which might be laid down for the regulation of mines and the guidance of persons employed in any capacity in them, the deceased became a servant of the defendants, the mine-owners. I do not think he did. It is for the safety and security of the mine that every one employed there shall be bound to conform to the rules, regulations, and terms imposed by the colliery owners, whether he be their servant or not. But this hardly seems to throw any additional light on the question whether the deceased was servant to the defendants or to Morris.

Primâ facie, though it may be otherwise under very special circumstances, a man is not a servant of two masters; that he is distinctly a servant of one is a strong argument that he is not the servant of another. Starting from that, there is in the present case no evidence to set aside the natural conclusion that the deceased, although he was bound to observe the regulations laid down for the guidance of people employed in the mine, was not the servant of any one other than Morris, the sub-contractor, to whom he was undoubtedly servant at the time. I have, therefore, come to the conclusion that the judgment of the deputy county court judge was wrong, and that this appeal should be allowed.

CHANNELL J. I agree. The whole point really turned upon the special clauses in the record book, and these clauses shew

that, in addition to the contract entered into by the deceased with his employer Morris, he also entered into a collateral contract—I use this as a convenient expression—with the mine-owners by clause 5 of the special conditions. The only question for our consideration is whether that collateral contract, so entered into by the deceased, was a contract of service or a contract personally to execute any work or labour within the meaning of s. 10 of the Employers and Workmen Act, 1875; this is a question of some little difficulty, but I think that it is to be answered in this way. Primâ facie a man does not serve two masters. The contract with the defendants is a sort of collateral contract by which the workman of the sub-contractor who enters into it agrees to observe the defendants' rules. It seems to me that although there was here a contract between the deceased and the defendants, it was not a contract of service within the meaning of the Employers' Liability Act, 1880. There is an expression in the judgment of Rigby L.J. in *Marrow* v. *Flimby and Broughton Moor Coal and Fire Brick Co.* (1) relative to the previous decision of *Brown* v. *Butterley Coal Co.* (2), which is important as shewing that privity of contract is one element, but only one element, necessary to establish the relation of master and servant. The importance of it is that, if that element be found to exist between two parties, and the contract so existing is one for service, it would generally negative any other contract of service between the party contracting to serve and some one else. The expression is used by Rigby L.J. with reference to the employment of butty-men in collieries, where it appeared that the immediate contractor was not a sub-contractor, as Morris was here, but a mere "butty-man," and that this was known to be a usual mode of doing piecework. What I understand the Lord Justice to mean is that privity of contract, once found between two parties, is an extremely important element, because in all probability it negatives any contract with any one else. Accordingly, the evidence here of a clear contract of service between the deceased and Morris negatives any contract to

(1) [1898] 2 Q. B. at p. 605. (2) 53 L. T. 964.

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personally execute work or labour between the deceased and the defendants within the meaning of s. 10 of the Employers and Workmen Act, 1875.

Appeal allowed. Leave to appeal.

Solicitors for plaintiff: *Charles Russell & Co.*

Solicitor for defendants: *W. Norton Ellen, for Edwin Peace, Liverpool.*

W. J. B.

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March 15.

In re BLUHM.

Criminal Law—Extradition—Committal—Additional Charges more than Two Months after Apprehension — Extradition Treaty with Germany arts. 9, 12.

By art. 9 of the extradition treaty with Germany, where a fugitive criminal is arrested upon a request for extradition, the preliminary investigation of the case is to be conducted as if the apprehension had been for a crime committed in the same country, and by art. 12 the fugitive is to be set at liberty if sufficient evidence for his extradition is not produced within two months from the date of his apprehension.

A fugitive criminal was arrested on December 15 on a warrant issued upon an information charging him with obtaining money by false pretences within the jurisdiction of the German Empire, and was remanded from time to time until the following February 14, when evidence was given upon one charge, which in the opinion of the magistrate was sufficient to justify the committal of the prisoner for trial if the crime had been committed in this country. The prosecution having intimated an intention to prefer additional charges, the necessary papers in which had only reached the magistrate on the previous day, the magistrate did not then commit the prisoner for extradition, but further remanded him until February 21, when evidence was taken upon thirty-one additional charges, and the prisoner was committed for extradition upon the original charge and thirty of the additional charges. Upon an application for a habeas corpus:—

Held, that there was in fact upon the depositions sufficient evidence to justify the committal of the prisoner upon the original charge on February 14, and that the prisoner was therefore not entitled to be set at liberty under art. 12.

Semble, per Channell and Bucknill JJ., that, sufficient evidence upon the original charge having been produced within two months of the arrest to justify a committal upon that charge, the magistrate was entitled after

the expiration of the two months to receive evidence upon charges other than that on which the prisoner had been arrested, and that the committal upon those charges was good.

ARGUMENT of an order nisi for a writ of habeas corpus. The order had been made upon the application of Joseph Bluhm, who had been committed for extradition upon charges of obtaining money by false pretences within the jurisdiction of the German Empire, and was made upon the following grounds: (1.) that no sufficient evidence for the extradition of the prisoner was produced within two months from the date of his apprehension, and that he ought thereupon to have been set at liberty; (2.) that the magistrate was not entitled after the expiration of two months from the date of the prisoner's apprehension to receive any evidence in support of charges other than those on which he had been apprehended; and (3.) that there was no evidence before the magistrate of the identity of the prisoner with the person named Joseph Bluhm referred to in the depositions taken in Germany.

From the affidavit of the learned magistrate and from other documents it appeared that on December 10, 1900, an information had been laid at Bow Street by a member of the German Imperial Consulate General, and on the same day the magistrate issued a provisional warrant under s. 8, sub-s. 2, of the Extradition Act, 1870, for the apprehension of Joseph Bluhm, who was accused of obtaining money by false pretences within the jurisdiction of the German Empire. On December 15 the prisoner was arrested; on December 17 he was brought before the magistrate at Bow Street, and, evidence of arrest having been given, he was remanded to December 24; on that day he was again remanded, and was subsequently remanded from time to time until February 14, 1901, pending the arrival of papers from Germany. On February 9 a request for the prisoner's extradition was made by the German Ambassador to the Secretary of State for Foreign Affairs, and on February 12 the Secretary of State, having received from the German Ambassador the files of evidence and the warrants from Germany, issued his order to the chief magistrate to proceed under the Extradition Acts. On February 14 the prisoner

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was brought up on remand at Bow Street, and certain evidence was taken relating to the case of one Wallesch, who was alleged to have been defrauded. After hearing the evidence, the magistrate found, and expressly stated in the presence of the prisoner and his solicitor, that the evidence was sufficient, according to the laws of this country, to justify the committal of the prisoner for trial if the crime had been committed here. He did not commit the prisoner for extradition on that day because further papers from the Home Office relating to the prisoner had reached him on the preceding day and were not yet all translated into the English language, and he stated that the prisoner would be remanded to give him an opportunity of considering the further papers. As the prisoner's solicitor stated that he wished to know precisely on what ground and on what charge the prisoner was to be remanded beyond the two months from his arrest, the prisoner was then formally charged with obtaining money by false pretences in respect of thirty-one further cases mentioned in a German warrant of February 6, and he was subsequently, during the afternoon of February 14, remanded to February 21 generally on the charge of obtaining money by false pretences within the jurisdiction of the German Empire. On February 21 evidence was taken in the thirty-one additional cases, and the prisoner was committed for extradition on all the cases mentioned in the German warrants of February 2 (respecting Wallesch's case) and February 6, except one case mentioned in the latter warrant. (1)

The Attorney-General (*Sir R. B. Finlay, Q.C.*), (*Henry Sutton* and *Bodkin* with him), shewed cause against the rule.

(1) By the extradition treaty with Germany, art. 9, "If the requisition for extradition be in accordance with the foregoing stipulations, the competent authorities of the State applied to shall proceed to the arrest of the fugitive. The prisoner is then to be brought before a competent magistrate, who is to examine him and to conduct the preliminary investigation of the case, just as if the apprehension had taken place for a crime committed in the same country."

By art. 12, "If sufficient evidence for the extradition be not produced within two months from the date of the apprehension of the fugitive, he shall be set at liberty."

Dealing with the case upon the footing that the provisions of the German extradition treaty are incorporated in the Extradition Act, 1870, the prisoner was properly committed for extradition. First, it is clear from the affidavit of the learned magistrate that within two months from the date of his apprehension sufficient evidence was produced to justify the prisoner's committal upon Wallesch's charge—the charge upon which extradition was originally applied for. The fact that the prisoner was not actually committed within the two months is immaterial, for art. 12 of the treaty does not entitle a prisoner to be set at liberty if not committed within that time, but only if no sufficient evidence to justify a committal is produced within it. Provided sufficient evidence is given within the two months to justify a committal, the evidence may be strengthened and the committal actually made after that period has elapsed.

Secondly, the evidence upon the charges other than that upon which the prisoner was apprehended was properly heard by the magistrate, and the committal upon those charges was good. Under s. 11 of the Extradition Act, 1870, and art. 10 of the treaty, the prisoner could not be surrendered for fifteen days after committal, and if he had been committed on February 14 there was for that period nothing to prevent the German Government making a fresh application for his extradition on fresh charges. If, on the other hand, sufficient evidence had not been given upon Wallesch's charge within two months after arrest, and the prisoner had been discharged by the magistrate, he might have been at once re-arrested upon the other charges. However the matter is looked at, the course taken by the magistrate was a reasonable one.

J. R. Randolph, for the prisoner, in support of the rule. There was no sufficient evidence in Wallesch's case within the two months to justify the committal for extradition. Upon the question of the sufficiency of the evidence the Court is not bound by the opinion of the committing magistrate: per Hawkins J. in *In re Castioni*. (1) Assuming, however, that there was sufficient evidence on Wallesch's case within the

(1) [1891] 1 Q. B. 149, 164.

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two months, the prisoner should have been committed on that case only. The time runs from the same date—the date of arrest—upon all the charges. The prisoner was entitled to be set at liberty on the other charges on February 14, for no evidence had been given on them; he could have been re-arrested upon any further charges that the prosecution thought fit to bring against him.

[CHANNELL J. The difficulty in your way is that the prisoner is applying to be set at liberty, whereas he is, as far as regards Wallesch's case at any rate, rightly in custody.]

He can be arrested or apprehended although already in custody: *Reg.* v. *Weil.* (1) After the two months the evidence in Wallesch's case might be strengthened, although already sufficient to justify a committal, but no fresh charges could be gone into.

CHANNELL J. I am of opinion that this rule must be discharged. Upon the first point, I think it is clear that there was in fact on the depositions taken on or before February 14 sufficient evidence to justify the committal for trial of the prisoner if the offence had been committed in England, and therefore that there was sufficient evidence to justify the magistrate in making an order for his extradition upon Wallesch's case. That being my opinion, it is unnecessary for me to consider whether the magistrate's opinion as to its sufficiency would have been binding upon us upon an application for habeas corpus if we had thought the evidence insufficient; there is, however, some authority to support the proposition that upon such an application the Court will not go behind the finding of the magistrate as to the sufficiency of the evidence to justify a committal. (2) The result is that within two months of the prisoner's apprehension sufficient evidence had been given before the magistrate to justify a committal upon Wallesch's charge, and that the prisoner is therefore not entitled to the benefit of art. 12 of the extradition treaty with Germany, and is not entitled to be set at liberty.

(1) (1882) 9 Q. B. D. 701.

(2) See *Ex parte Huguet,* (1873) 29 L. T. (N.S.) 41; *Reg.* v. *Maurer,* (1883) 10 Q. B. D. 513.

Other questions have been argued as to which, in view of their importance, we granted the rule nisi; but I am not sure that it is necessary for us to express an opinion as to whether the remaining proceedings—that is, the committal on February 21 on the other thirty charges—were regular, for, if they were irregular, I do not see how an application for a writ of habeas corpus could be granted, seeing that the prisoner is not entitled to be set at liberty. I do not see how we can say authoritatively whether those proceedings were regular, as we determine the case on a ground which prevents that question arising. But I must say that it seems to me that the proceedings were entirely regular. Art. 12 of the treaty was intended to protect the prisoner against whom a case for committal was not made out from being detained for a longer period than two months upon suspicion, and it gave him a right to be set at liberty if within that time a case was not made out against him. If that article does not apply, and if the prisoner has no right to be set at liberty, the procedure to be followed is the same as the procedure upon a similar charge in this country. Art. 9 provides that after arrest the prisoner is to be brought before a competent magistrate, who is to examine him and to conduct the preliminary investigation of the case, just as if the apprehension had taken place for a crime committed in this country. In this country, if a prisoner is charged with one offence, and the evidence is in the opinion of the magistrate sufficient to justify his committal for trial, he may, and very frequently does, commit him then and there to the assizes or quarter sessions, with a view to his being tried as soon as possible; but this course is not necessarily adopted where it comes to the magistrate's knowledge that there are other charges pending against the prisoner. For instance, a prisoner would not be entitled to be released if he were charged with the commission of a burglary and the evidence on that charge were completed, and just before he was about to commit him the magistrate were told that there were two other charges of burglary against him, the witnesses in which would appear next week; in such a case the magistrate would probably not commit the prisoner at once on the one charge, but would

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remand him, and then upon the remand the whole of the three charges would be completed and the prisoner would be committed upon all. Such proceedings would be quite regular, and no application could possibly be successfully made for his discharge upon a writ of habeas corpus. The only difference between that case and the present arises from the presence of art. 12 in the German extradition treaty; that article, however, does not apply to the facts of the present case. I think, therefore, that the proceedings before the magistrate were regular, and they were most certainly simple and businesslike.

There is another point which I may notice. It may be that when he gets to Germany the prisoner may be entitled under art. 7 of the treaty, or under the provisions of German law contemplated by that article, to say that he has been properly extradited upon one charge only; if so, he can take advantage of the point in Germany.

I am, therefore, clearly of opinion that this is not a case in which it is possible to grant a writ of habeas corpus; and also, that if the application to us had been in the nature of a writ of certiorari or to quash the proceedings we could not have granted it.

BUCKNILL J. I agree, and for the same reasons. I need only add that no injustice can possibly be done by our decision, for the prisoner can raise the same point again in Germany under art. 7 of the treaty.

Rule discharged.

Solicitor for the Crown: *Solicitor to the Treasury.*
Solicitors for prisoner: *Crawshaw & Caldicott.*

W. J. B.

SIMULTANEOUS COLOUR PRINTING SYNDICATE *v.* FOWERAKER.

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March 22.

Company—Contract to issue Debentures—Charge—Execution Creditor—Priority.

Where a company contracts for consideration to issue debentures charging its property, and before the debentures are actually issued goods intended to be thereby charged are seized in execution of a judgment recovered against the company, the execution creditor is only entitled to the goods subject to a charge in favour of the intended debenture-holders.

TRIAL of interpleader issue before Wright J. without a jury.

In June, 1900, the plaintiffs, who carried on the business of colour-block printers, entered into an agreement with A. T. Frampton to sell to him their business, together with all their plant and stock-in-trade, for a sum of 12,000*l.*, which was to be satisfied as to 9000*l.* by the issue and allotment to the plaintiffs of 9000 fully paid 1*l.* shares in the capital of a company then about to be formed by Frampton for the acquisition and working of the said business, and as to the remaining 3000*l.* by the issue to the plaintiffs of debentures to that amount by the said intended company, and secured upon all the assets and undertaking of the said company; and it was provided that the plaintiffs should forthwith deliver to Frampton or the intended company all the plant and stock-in-trade subject to the issue to the plaintiffs of the shares and debentures as aforesaid. The intended company was duly formed under the name of the Mosaic Printing Machine Syndicate; and by an agreement dated August 15, 1900, Frampton agreed to transfer to the said Mosaic Syndicate the benefit of his contract with the plaintiffs. A draft assignment by the plaintiffs of their business, &c., to the Mosaic Syndicate was prepared, but not executed. Pending completion the Mosaic Syndicate were allowed to use the business premises and plant. They were desirous of removing the plant and other goods to fresh premises; but the plaintiffs refused to allow them to do so unless they first issued the stipulated debentures. Accordingly, on

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September 21, a resolution was passed by the Mosaic Syndicate that there should be issued to the plaintiffs sixty debentures of 50*l.* each in the form which had already been approved by the plaintiffs' solicitors. By that form the Mosaic Syndicate charged with the payment of the principal and interest secured by the debentures its undertaking and all its property present and future. On September 26 the Mosaic Syndicate wrote to the plaintiffs informing them of the said resolution, and stating that the scrip would be issued in the course of a few days.

On the faith of this letter the plaintiffs allowed the Mosaic Syndicate to take possession and remove the plant and goods. The issue of the debentures was, however, delayed. On October 4 the plaintiffs' solicitors wrote to press for their immediate delivery; but the debentures were not in fact sealed and issued until October 11. In the meantime, on October 9, the sheriff had seized certain of the goods so removed by the Mosaic Syndicate and intended to be charged by the debentures in execution of a judgment recovered by the defendant Foweraker against the Mosaic Syndicate. The plaintiffs claimed to have a charge upon the goods seized in priority to the execution creditor. The sheriff interpleaded.

J. R. Atkin, for the plaintiffs. If the debentures had in fact been issued before the execution was levied, it is clear that the plaintiffs would have had priority over the sheriff. In *In re Standard Manufacturing Co.* (1) it was stated by the Court in the course of argument to be "well settled that an execution creditor takes subject to all the equities"; and Lord Halsbury L.C. observed that "The sheriff cannot, by seizing, get rid of the rights of third persons to which the property was subject in the hands of the debtor." And the view so expressed has since been followed by the Court of Appeal in *In re Opera, Limited* (2), and *Taunton* v. *Sheriff of Warwickshire.* (3)

Then the effect of the letter of the Mosaic Syndicate, undertaking to issue the debentures forthwith and upon the faith

(1) [1891] 1 Ch. 627, at p. 641. (2) [1891] 3 Ch. 260.
(3) [1895] 2 Ch. 319.

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of which they were permitted to take possession of the goods, was to put the plaintiffs in the same position as if the debentures had actually been issued to them: *In re Queensland Land and Coal Co.* (1)

J. Gray, for the defendant. The Mosaic Syndicate's contract to issue debentures was ineffective to charge the property until the debentures were actually issued and delivered; and as the execution had been put in before they were issued, the sheriff has priority over the plaintiffs.

WRIGHT J. The question raised in this case is one of some importance, but I do not think that it is open to much doubt. The facts are shortly these: The plaintiffs in substance agreed to sell the goods in question through Frampton to the Mosaic Syndicate upon the terms, amongst others, that the purchasers were not to have possession of the goods until they had issued to the plaintiffs in part payment of the purchase-money debentures for 3000*l.* charged upon all their property, including these very goods. On September 26 the Mosaic Syndicate wrote to the plaintiffs informing them that a resolution had been passed to seal debentures to that amount, and that the scrip would be issued in the course of the next few days. That letter was acted upon by the plaintiffs, who thereupon allowed the Mosaic Syndicate to take possession of the goods. Before, however, the debentures were in fact issued, an execution was put in by the defendant Foweraker on October 9, and the question is whether, in so seizing in execution the goods which were at that time in law the goods of the Mosaic Syndicate, he took the goods absolutely or subject to the equity which bound them in the hands of the Mosaic Syndicate. The case of *In re Standard Manufacturing Co.* (2) and the other cases cited by the plaintiffs shew clearly that, if the debentures had been actually issued before the date of the execution, the execution creditor would have taken subject to the plaintiffs' rights. And the effect of the letter of September 26, upon the faith of which the plaintiffs parted with the possession of the goods, was, in my opinion, to put the

(1) [1894] 3 Ch. 181. (2) [1891] 1 Ch. 627, at p. 641.

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plaintiffs in the position of debenture-holders, and to give them a charge equivalent to that of actual debentures. The language of the Court in *In re Standard Manufacturing Co.* (1), that "an execution creditor takes subject to all the equities," is wide enough to cover the present case. There must be a declaration that the execution creditor is entitled to the goods only subject to the plaintiffs' charge.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Williams, Goss & Co.*
Solicitors for defendant: *F. R. Smith, Sons & Co.*

J. F. C.

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March 21, 26.

TAYLOR *v.* GREAT EASTERN RAILWAY COMPANY.

Goods—Sale of—Passing of Property under unenforceable Contract—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 4, *sub-s.* 1.

Semble, the fact that a contract for the sale of goods does not comply with the requirements of s. 4 of the Sale of Goods Act, 1893, though it renders the contract not enforceable by action, does not make it void, and does not prevent the property in the goods from passing under it to the purchaser.

Nicholson v. *Bower*, (1858) 1 E. & E. 172, discussed.

TRIAL in the Commercial Court before Bigham J.

On October 19, 1900, a firm of Barnard Brothers sold to one Sanders a quantity of barley at the price of 68*l.* 5*s.* on rail at Elsenham Station on the defendants' railway. Messrs. Barnard gave to Sanders an invoice containing the terms of the contract in the following form: "Newport, Essex. October 19, 1900. Mr. George Sanders. Bought of Barnard Brothers. Per on rail at Elsenham to your order, 52 qrs. 4 bus. barley at 26*s.*, £68 5*s.*" There was no memorandum in writing of the contract signed by Sanders. On October 24 Messrs. Barnard gave a written order to the defendants directing them to transfer the barley to Sanders; and thereupon the defendants

(1) [1891] 1 Ch. 627, at p. 641.

sent to Sanders an advice-note informing him that the barley was at the station awaiting his order. After receiving this advice-note Sanders tried to resell the barley, using for the purpose a sample obtained from Barnard Brothers, but he did not succeed in finding a purchaser. He never inspected or sampled the bulk at the railway station. Towards the end of November Sanders committed an act of bankruptcy on which he was subsequently adjudicated, and the plaintiff was appointed trustee. On or about November 30 Messrs. Barnard, as unpaid vendors, claimed to stop the goods in transitu, and demanded the barley from the defendants, who gave it up to them. The plaintiff then sued the defendants for conversion.

Montague Lush, for the defendants. There was no valid contract of sale binding on Sanders. There was no memorandum signed by him, nor any part payment, and the mere attempt to resell goods which he had not inspected was not an acceptance of them within s. 4 of the Sale of Goods Act, 1893. [He referred to *Taylor* v. *Smith*. (1)] Then, if the contract was not binding on Sanders, no property passed to him under it, and the goods are consequently not the goods of the plaintiff. The case is undistinguishable from *Nicholson* v. *Bower*. (2) There it was held that upon a sale of wheat under a contract not in writing, in the absence of such an acceptance as would satisfy s. 17 of the Statute of Frauds, the property did not pass to the purchaser, and that the purchaser having become bankrupt the wheat did not belong to his assignees as against the vendor. The reason given by Lord Campbell C.J. for the decision is that "the property never legally vested in him" (the purchaser) "the contract of sale not being binding." It is true that the language of s. 17 of the Statute of Frauds under which that case was decided was somewhat different from that of the Sale of Goods Act—the former Act saying that "no contract . . . . shall be allowed to be good," the latter that "a contract . . . . shall not be enforceable by

(1) [1893] 2 Q. B. 65. (2) 1 E. & E. 172.

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action." But it has been held that the language of s. 17 of the Statute of Frauds meant, not that the contract was void, but merely that it could not be enforced. (1) The inability to enforce the contract is enough to prevent the property passing. Therefore the case of *Nicholson* v. *Bower* (2) is equally applicable as an authority upon the language of the present Act. If the plaintiff is right, he can recover the value of the barley from the defendants, and yet cannot be compelled to pay even a dividend to the vendors. That would be a great injustice.

D. Stephens, for the plaintiff. There was a contract binding on Sanders, the purchaser, as well as on the vendors. The attempt to resell is evidence from which the Court may infer an acceptance of the goods, being an act done in relation to the goods which recognised a pre-existing contract of sale within the meaning of s. 4, sub-s. 3, of the Sale of Goods Act. The opinion of Lord Herschell in *Taylor* v. *Smith* (3), that the mere doing of some act which recognises the contract is insufficient to constitute an acceptance, is overruled by the statute, which goes back to the rule of law laid down by Brett M.R. in *Page* v. *Morgan* (4): see *Abbott* v. *Wolsey*. (5)

But even if the contract was not enforceable against Sanders, it was nevertheless a good contract to the extent of allowing the property to pass under it. The decision in *Nicholson* v. *Bower* (2) must be taken to have turned upon the language of the Statute of Frauds. Under that Act a contract which did not satisfy its requirements was not "allowed to be good"—in other words, it was void; and no property could pass under a void contract. But the language of the present Act assumes that the contract, notwithstanding its omission to satisfy the requirements of s. 4, is a good contract although unenforceable by action. But if the contract is good, there is no reason why the property should not pass. If, however, the same

(1) See *Bailey* v. *Sweeting*, (1861) 9 C. B. (N.S.) 843, at p. 860.
(2) 1 E. & E. 172.
(3) [1893] 2 Q. B. 65.
(4) (1885) 15 Q. B. D. 228, at p. 231.
(5) [1895] 2 Q. B. 97.

meaning is to be given to the language of both Acts, then it is submitted that *Nicholson* v. *Bower* (1) was wrongly decided. (2)

Cur. adv. vult.

March 26. BIGHAM J. In this case one of the defences (3) relied upon by the defendants was that although Barnard Brothers had signed a sufficient memorandum of the contract of sale within the meaning of s. 4 of the Sale of Goods Act, Sanders had not; and it was said that he had neither paid any part of the price (which was true) nor accepted any part of the goods. In these circumstances it was argued, as I understand, that the property in the goods had not passed from Barnards to Sanders, and that, therefore, Barnards were entitled to possession. I may say at once that this contention, whatever it may be worth in law, is not well founded in fact. I am of opinion that the goods had been accepted by Sanders. He had certainly received them, though, of course, receipt does not necessarily involve acceptance. But after receiving them he had obtained a sample, not, it is true, by drawing it from the bulk at the station, but by asking the vendors to let him have a sample which was in their possession. By means of this sample he had tried to sell the goods. He had, moreover, kept them for a month. These circumstances, in my opinion, amount to an acceptance. The words in s. 17 (now repealed) of the Statute of Frauds were, "except the buyer shall accept part of the goods so sold and actually receive the same." Many cases are to be found in the reports dealing with the meaning of these words, but it is unnecessary to examine them: their effect is to be found sufficiently and,

(1) 1 E. & E. 172.

(2) In *Nicholson* v. *Bower*, Mr. Bovill, as counsel for the plaintiffs, seems to have admitted in the course of argument that an acceptance was necessary to pass the property. "There has been, therefore," he said, "a contract of sale, a delivery, and an acceptance; and the effect of those three combined is to pass the property."

(3) Another question which was argued was whether the transitus of the goods was not at an end. But as the decision on that point turned entirely upon a question of fact, that portion of the judgment has been omitted from this report.

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Bigham J.

in my opinion, accurately stated on pp. 149–150 of the 3rd edition of Mr. Chalmers' book on the Sale of Goods Act, and that new Act contains what the Statute of Frauds did not contain—a definition of the word "acceptance" in this connection. Sect. 4, sub-s. 3, provides that "There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not." Now, I think there could not be a clearer act recognising a pre-existing contract of sale than the attempt by Sanders to resell. If he had in fact resold, would that not have been sufficient? And if an actual sale, then why not also an attempt to sell? Can any one suppose that Sanders could have successfully resisted an action for the price? The defendants referred to and relied on a decision under the old Act in 1892: *Taylor* v. *Smith*. (1) That case was dealt with by the Court as merely involving a question of fact. This appears from an examination of the judgments. I see by a foot-note that the case was reported about a year after it was decided "in deference to representations from various quarters." I think the editor would have done well to have resisted those representations, for the case declares no principle of law and is, in my opinion, of no general application. It was held there that the buyer did not by looking at the goods at the wharfingers, and by saying "I reject them," in fact accept them. For my part I agree; but it by no means follows that I think in the present case that the buyer did not accept the goods. I think he did; and I think, therefore, that, though there was no memorandum in writing signed by Sanders, the provisions of the statute were sufficiently complied with to make the contract of sale binding upon him. The view which I take of the facts makes it unnecessary to consider the point of law, but I should like to say a word or two about it and about the case of *Nicholson* v. *Bower* (2), which was cited by Mr. Lush in support of it. I think that the absence of a memorandum in writing, and of

(1) [1893] 2 Q. B. 65. (2) 1 E. & E. 172.

the other conditions mentioned in s. 4, sub-s. 1, of the Sale of Goods Act, does not make a contract void or even voidable. The contract is good. The only effect of the non-fulfilment of the statutory conditions is that it is unenforceable. And, the contract being good, all the legal consequences of a contract follow; so that, if the contract is for the sale of specific goods, the property in the goods passes to the buyer. It may be asked, What happens if the buyer, after making the purchase, refuses to fulfil any of the statutory conditions which alone will make the contract enforceable against him? The property in the goods has passed to him, and it may be that he has received the goods themselves, yet he cannot be sued for the price. My answer is that the seller may call on the buyer to pay for the goods, and, if he fails to comply, the seller may treat the contract as rescinded. The effect of such rescission would be to revest the property in the seller and to entitle him to resume possession. As to the case of *Nicholson* v. *Bower* (1), it was an issue to try whether certain wheat was the property of the plaintiff, who was the assignee of one Pavitt, a bankrupt, or the property of the defendant who had sold the wheat to Pavitt. Pavitt had not complied with the requirements of the statute, so that the contract of sale never was enforceable against him, and it seems to have been decided that on this ground there was no binding contract between the vendor and the vendee, and that, therefore, the property never legally vested in the buyer. If that is the true ground of the decision, I do not think it was right, nor do I think it is in accordance with the later cases decided under the statute. The seller had sold the goods and was clearly bound by the contract, and the buyer had bought the goods although he could not be sued for the price if he chose to insist on the statutory defence. In such circumstances it would not be true to say that the property had not passed. I think, however, upon a careful examination of the facts of the case, the decision may be justified on the supposition that before the assignee's title could be said to have arisen the vendor and the vendee had rescinded the contract so that the property had revested in the

(1) 1 E. & E. 172.

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former; and this appears to have been the ground upon which the judgment of Erle J. proceeded. There must be judgment for the plaintiff.

Judgment for the plaintiff.

Solicitors for plaintiff: *Beaumont, Son & Rigden.*
Solicitors for defendants: *Timbrell & Deighton.*

J. F. C.

C. A.

1901

March 13.

[IN THE COURT OF APPEAL.]

WRIGLEY *v.* BAGLEY & WRIGHT AND WHITTAKER & SONS.

Employer and Workman—Workmen's Compensation—"Engineering Work"—Machinery worked by Hand Power—Contractor—Work ancillary or incidental to, and being no part of, or process in, a Business—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 4; *s.* 7, *sub-s.* 2.

A firm of engineers contracted with the owners of a cotton-spinning factory to put a new driving wheel into the steam-engine belonging to the factory. While engaged in the work of fixing the new wheel, a workman employed by the engineers met with an accident which caused his death:—

Held, that, the work being merely ancillary or incidental to, and no part of, or process in, the business of the owners of the cotton-spinning factory, the case did not come within s. 4 of the Workmen's Compensation Act, 1897; and therefore that a dependant of the deceased workman was not entitled to compensation under the Act against the owners of the cotton-spinning factory.

APPEAL from the decision of the county court judge of Oldham, refusing to award compensation under the Workmen's Compensation Act, 1897.

The appellant was the widow of a deceased workman, who had been in the employ of the respondents, Whittaker & Sons, who were engineers. The latter had contracted with the respondents, Bagley & Wright, who were cotton spinners, to supply and fix a new driving wheel for the steam-engine belonging to their cotton spinning factory. A hand-winch and pulleys were used for the purpose of lifting the new driving

wheel, which was of considerable weight, into its place. The deceased workman was engaged in directing that operation, when he met with an accident which caused his death. The appellant claimed compensation alternatively against the deceased workman's employers and Bagley & Wright. The county court judge held that the work upon which the deceased was employed when he met with his death was not an "engineering work" for the purposes of the Workmen's Compensation Act, 1897, the machinery used not being "driven by steam, water, or other mechanical power," within the meaning of s. 7, sub-s. 2, of that Act; and that the work was merely ancillary or incidental to, and no part of, or process in, the business of the respondents, Bagley & Wright.

Joseph Walton, K.C., and *J. Montefiore*, for the appellant. The appellant cannot contend in this Court that the deceased man's employers were the occupiers of, and therefore undertakers in respect of, the factory in which the accident occurred: see *Francis* v. *Turner Brothers*. (1) It is contended, however, that they are liable on the ground that they were undertakers in respect of an "engineering work" on which the workman was employed. "Engineering work" by s. 7, sub-s. 2, means (inter alia) any work "for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used." The pulleys were "machinery" worked by the "mechanical power" of the winch; but the winch itself was no doubt worked only by hand power.

With regard to the other respondents, Bagley & Wright, it is submitted that they were liable as undertakers under s. 4 of the Workmen's Compensation Act, 1897. There is no question that they would come within the words of the enacting part of that section which makes the undertakers liable to the workman of a contractor. The only question is whether they come within the exception at the end of the section, which provides that it "shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of, or process

(1) [1900] 1 Q. B. 478.

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in, the trade or business carried on by such undertakers respectively." Repair of the engine from time to time is as much part of the business of cotton spinners as oiling and cleaning it would be. It may be that putting up the steam-engine, and other necessary machinery in the first instance cannot be said to be part of the business of cotton spinners, any more than building the factory, or than erecting an intermediate railway station could, in *Pearce* v. *London and South Western Ry. Co.* (1), be said to be part of the business of a railway company as a carrier of goods and passengers. The business does not begin to be carried on till after the necessary plant is provided. But it is submitted that incidental repairs by way of keeping the machinery in a fit state to do its work may be said to be a necessary part of the business.

Rowlatt, for the respondents, Bagley & Wright, and *Ruegg*, *K.C.*, and *F. H. Mellor*, for the respondents, Whittaker & Sons, were not called on.

A. L. SMITH M.R. This is an appeal from the decision of a county court judge, who refused to award to the appellant compensation under the Workmen's Compensation Act, 1897. The appellant, as a dependant on a deceased workman, claimed compensation alternatively against the workman's employers, and against a firm of cotton spinners, with whom they had contracted for the work on which the workman was engaged when he met with the accident which caused his death. The appellant's counsel could not press the contention that the deceased man's employers were liable. Then, with regard to the other respondents, the appellant can only recover against them, if she can succeed in bringing the case within s. 4 of the Workmen's Compensation Act, 1897; but it is provided that the section shall not apply where the work, which is being executed, is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on by the undertakers. The county court judge held that the work in question, which was putting a new driving wheel into a steam-engine in the respondents' factory, came within the last-mentioned pro-

(1) [1900] 2 Q. B. 100.

vision, and therefore was not within the enacting part of the section. In my opinion he was right in so holding. I do not see how it is possible to say that putting a new driving wheel into the engine was part of, or a process in, the trade or business of cotton spinners carried on by the respondents. For these reasons the appeal must be dismissed.

COLLINS L.J. I am of the same opinion. As regards the liability of the deceased man's employers, the appellant's counsel admitted that they could not contend in this Court that the respondents were liable as undertakers in respect of the factory in which the deceased man was employed when he met with the accident; and, with regard to the contention that the work on which he was engaged was an "engineering work," they were met by the difficulty that the machinery used was not "driven by steam, water, or other mechanical power." Then the question remains whether the other respondents, Bagley & Wright, were liable under s. 4 of the Act. It seems to me that the scope of that section is clear enough. It contemplates the case of persons who, being undertakers in respect of a particular class of business, substitute for themselves a contractor to do some part of that business, and provides that the workmen of such a contractor shall have the same rights against such persons as they would have if they were employed by them. The reason of such a provision obviously is that, if a person substitutes another for himself to do that which is his own business, he ought not to escape the liability which would have been imposed upon him, if he had done it himself, towards the workmen employed in that business. The concluding part of the section is inserted to shew clearly that it is not intended to apply to a case where a contractor is employed by a person to do that which forms no part of, or process in, that person's business. One case which came before this Court in *Pearce* v. *London and South Western Ry. Co.* (1), namely, that of altering a railway station, afforded an excellent illustration of work which was merely ancillary or incidental to, and formed no part of, or process in, the work of

(1) [1900] 2 Q. B. 100.

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a railway company. The present is, in my opinion, an equally good illustration of work which is ancillary to, as distinguished from work which forms part of, a business. Putting a new driving wheel into an engine used in a cotton-spinning factory cannot, I think, be described as part of, or a process in, the business of cotton spinning.

ROMER L.J. I agree. Putting a new driving wheel into an engine cannot be said to be part of, or a process in, the business of cotton spinners any more than building the factory in which they intend to carry on their business can be said to be a part of, or process in, that business.

Appeal dismissed.

Solicitors for appellant: *Mills, Lockyer & Mills, for D. E. Griffiths, Oldham.*

Solicitors for the respondents, Bagley & Wright: *Field, Roscoe & Co., for G. P. Fripp, Oldham.*

Solicitors for respondents, Whittaker & Sons: *R. B. Wheatly, Son & Daniel, for Cobbett, Wheeler & Cobbett, Manchester.*

E. L.

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A purchaser went into a chemist's shop and asked to be supplied with "mercury ointment." Mercury ointment is one of the medicines contained in the British Pharmacopœia. The chemist supplied him with an ointment containing a less proportion of mercury than that prescribed by the formulary of the Pharmacopœia :—

Held, that, although the purchaser did not refer to the Pharmacopœia, he must be taken to have demanded that the ointment should be compounded of the proportions therein prescribed, and that upon a complaint under s. 6 of the Sale of Food and Drugs Act, 1875, the vendor was rightly convicted of having sold a drug not being of the quality demanded by the purchaser.

White v. *Bywater*, (1887) 19 Q. B. D. 582, followed.

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See INSURANCE, MARINE.

BANKRUPTCY—*Act of Bankruptcy—Bankruptcy Notice—Final Judgment, Person entitled to enforce a—Trustee in Bankruptcy of Judgment Creditor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 1—*Order* XVII., *r.* 4; *Order* XLII., *r.* 23.

The trustee in bankruptcy of a judgment creditor, who has obtained an order under Order XVII., r. 4, making him a party to the action, but has not obtained leave to issue execution under Order XLII., r. 23, is not "a person who is for the time being entitled to enforce a final judgment" within the meaning of s. 1 of the Bankruptcy Act, 1890, and is therefore not entitled to issue a bankruptcy notice against the judgment debtor in respect of the judgment debt. *In re* CLEMENTS. *Ex parte* CLEMENTS Div. Ct. 260

2. —— *Act of Bankruptcy—Married Woman—"Carrying on" Business separately from Husband—Unpaid Debts—"Absenting"—Liability of Married Woman to Bankruptcy Laws—Receiving Order—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 5—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*d*).

A married woman who has sold a business carried on by her separately from her husband must be deemed to be still "carrying on" the business within s. 1, sub-s. 5, of the Married Women's Property Act, 1882, so long as the debts she has incurred in the business remain unpaid; and therefore, in such a case, she is subject under that sub-section, in respect of her separate property, to the bankruptcy laws, so that a receiving order may be made against her at the instance of a trade creditor.

In re Dagnall, [1896] 2 Q. B. 407, approved.

A married woman who has bought a business out of her separate estate, and is carrying it on as her own, is not the less "carrying on a trade separately from her husband" within the above sub-section because the business happens to be carried on in the house in which she and her husband are living and the husband may be taking some part in the management of it.

A married woman who, while carrying on a business separately from her husband, leaves her place of business without paying her creditors or notifying her change of address, commits an act of bankruptcy by "absenting herself with intent to delay or defeat her creditors" within s. 4, sub-s. 1 (*d*), of the Bankruptcy Act, 1883, even though she leaves at her husband's request in order to live with him elsewhere. *In re* WORSLEY C. A. 309

3. —— *Act of Bankruptcy—"Notice"—Peti-*

BANKRUPTCY—*continued.*

tion—Suspension of Payment—Verbal Admission of Insolvency—Debt—Payment on a Contingency—Future Partnership—"Liquidated Sum"—Damages—Petitioning Creditor's Debt—Loan by one Partner to another, Recovery of—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*h*); *s.* 6, *sub-s.* 1 (*b*)—*Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 3.

Under an agreement made in January, 1900, between M., a stockbroker, and T., with a view to T.'s ultimately becoming a member of the Stock Exchange and entering into partnership with M., T. paid 2000*l.* into M.'s banking account, subject to a condition that if T. should not, on or before September 29, 1900, become a member of the Stock Exchange, or if, having become a member, he should not be at liberty to enter a partnership within that period by reason of his recommenders withholding their consent, then and in either of those cases T. should have the option of determining the agreement by notice, whereupon the 2000*l.* should be repaid by M.

On June 28 M. was "hammered" on the Stock Exchange, and on July 3 he told T. in conversation that "he was utterly penniless," that "he could not pay anybody," and that "he had lost everything." Thereupon T., without having given any notice purporting to determine the agreement, presented a bankruptcy petition against M., alleging that M. was indebted to him "in the sum of 2000*l.* lent by him to M. pursuant to the agreement," and that the act of bankruptcy was that the debtor gave him "notice" on July 3 of having "suspended payment of his debts":—

Held, that the alleged debt of 2000*l.* was not "a liquidated sum, payable either immediately or at some certain future time," within s. 6, sub-s. 1 (*b*), of the Bankruptcy Act, 1883, and was therefore not sufficient to support the petition, and that on July 3 T.'s only remedy was in damages for breach of the agreement:

Held, also, by Lord Alverstone C.J., that if on July 3 T. had been in fact a "creditor" of M., the statement then made by M. to T. would have been a "notice" of suspension of payment constituting an "act of bankruptcy" within s. 4, sub-s. 1 (*h*). *In re* MILLER - - C. A. 51

4. —— *Annulment—Payment of Debts in Full—Application to annul Adjudication—Discretion to refuse Order—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 35, *sub-s.* 1.

Where a bankrupt, whose debts have been paid in full, applies, under the Bankruptcy Act, 1883, s. 35, sub-s. 1, for an order annulling his adjudication, the Court has discretion to refuse an order, if, having regard to the conduct of the bankrupt, it seems right to do so.

Therefore, where a bankrupt, in his statement of affairs, and on his public examination, concealed the fact that he possessed a large sum of money, and afterwards handed to the official receiver a portion of that money sufficient to pay his debts in full, with interest and expenses, and applied for an order annulling his adjudication, which was refused:—

Held, that the refusal was right. *In re* TAYLOR. *Ex parte* TAYLOR - Div. Ct. 744

BANKRUPTCY—*continued.*

5. —— *Disclaimer of Lease—Lease determined as between Lessor and Lessee—Surety for Lessee—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 55, *sub-s.* 2.

The defendant had guaranteed the payment of rent which might from time to time be in arrear for twenty-one days under a lease. There had not been any underlease or assignment of the lease. The lessee having become bankrupt, the trustee in bankruptcy disclaimed the lease. The lessor sued the defendant for an amount which he claimed as rent in arrear in respect of a period subsequent to the disclaimer:—

Held, affirming the judgment of Phillimore J., that, the effect of s. 55, sub-s. 2, of the Bankruptcy Act, 1883, being that the lease was determined from the date of the disclaimer as between the lessor and the lessee, the liability of the defendant for rent in futuro was also determined, and therefore the action was not maintainable. STACEY *v.* HILL - - C. A. 660

6. —— *Fraudulent Preference—Breach of Trust—Trustee and Cestui que Trust—"Debtor and Creditor"—Voluntary Restitution on Eve of Bankruptcy—Dominant Motive for Gift—Appeal to the House of Lords, Leave to—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.

A trustee of a settlement who had misappropriated the trust fund, subsequently, on the eve of his bankruptcy, deposited in the trust box (which was then in his custody, as solicitor to the trust), but voluntarily and without any communication with his co-trustee or cestuis que trust, certain railway debentures belonging to him, accompanied by a memorandum admitting his breach of trust, expressing gratitude for kindness received from his cestuis que trust during his pecuniary difficulties, and stating that the deposit was made in order to make good the breach of trust. He was shortly afterwards adjudicated bankrupt:—

Held, by the Court of Appeal, reversing Wright J., that, on the memorandum, the bankrupt's dominant motive for the deposit was, not to prefer his cestuis que trust to his other creditors, but to repair the wrong he had done by his breach of trust, and therefore the transaction could not be set aside as a "fraudulent preference" within s. 48 of the Bankruptcy Act, 1883. Leave to appeal to the House of Lords was refused.

Whether the relation of "debtor and creditor" exists as between a defaulting trustee and his cestui que trust, *quære*.

Dictum of Lord Halsbury L.C., in *Sharp* v. *Jackson*, [1899] A. C. 419, 426, questioned. *In re* LAKE. *Ex parte* DYER - - C. A. 710

7. —— *Interpleader—Property Divisible among Creditors—Property held on Trust—Assignee for Benefit of Creditors—Right of Indemnity over Assets of Trust—Lien passing to Trustee in Bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

The assignee under a deed of assignment for the benefit of creditors incurred debts in the course of carrying on the business. Judgment having been obtained against him, the execution creditor seized some of the assets of the business.

BANKRUPTCY—*continued.*

The assignee having meanwhile become bankrupt, these assets were claimed by the trustee in bankruptcy. In an interpleader issue:—

Held, that although the assets were property held on trust by the bankrupt, and so by virtue of s. 44 of the Bankruptcy Act, 1883, were not divisible among his creditors, yet that he had a right of indemnity over them in the nature of a lien which passed to his trustee in bankruptcy, and that therefore the trustee in bankruptcy was entitled, to succeed as against the execution creditor. JENNINGS *v.* MATHER - **Div. Ct. 108**

8. —— *Petition—Limited Company—Presentation of Petition by "Officer" of the Company—Clerk—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 148.

Any person bonâ fide chosen by a limited company and duly authorized under seal to be their agent for the signing and presentation of a petition in bankruptcy, thereby becomes an "officer" of the company for that purpose within s. 148 of the Bankruptcy Act, 1883, which provides that for all or any of the purposes of the Act "a corporation may act by any of its officers authorized in that behalf under the seal of the corporation." Thus a clerk in the employ of the company so authorized, though not in the ordinary sense an "officer," may sign a bankruptcy petition. *In re* J. G. TOMKINS & Co. **C. A. 476**

9. —— *Proof of Debt—Husband and Wife—Bankruptcy of Husband—Wife Surety for Husband's Debt—Payment of Debt by Wife—Right of Exoneration—Money Lent by Wife to Husband—Onus of Proving whether Lent for purposes of Husband's Business—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 3.

A wife at the request of her husband (a trader) deposited with his bankers the title deeds of her separate real estate as security for advances to be made by them to him for the purpose of his business. The bankers made advances to him on the security of the deeds and a memorandum of deposit signed by the wife. She afterwards paid off his debt to the bankers. After his death an order was made for the administration of his estate in bankruptcy:—

Held, that s. 3 of the Married Women's Property Act, 1882, did not apply, and that the wife was entitled to prove against the estate for the amount which she had paid to the bankers, with interest thereon.

The wife also lent a sum of money to her husband, and she claimed to prove against his estate for that sum. She did not in her affidavit say that the loan was not made for the purpose of the husband's business, and the trustee of the estate adduced no evidence that it was made for that purpose, and he did not cross-examine the wife:—

Held, that the proof ought to be admitted.

Per Vaughan Williams L.J.: *In re Genese*, (1885) 16 Q. B. D. 700, must not be understood as a decision that s. 3 of the Married Women's Property Act, 1882, in every case throws on a wife who is claiming to prove in her husband's bankruptcy for money lent by her to him the onus of shewing that the loan was not made for the purpose of his business. *In re* CRONMIRE. *Ex parte* CRONMIRE - - - - **C. A. 480**

BANKRUPTCY—*continued.*

10. —— *Receiving Order — Composition Scheme—Proof by Secured Creditor for Purpose of Voting admitted—Appeal by Debtor against Admission of Proof—Conditional Withdrawal of Proof refused—Leave to Amend—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *Sched. II., r.* 12.

A creditor claiming to hold security for part of his debt, and who makes a proof for the unsecured balance for the purpose of voting on a composition proposed by the debtor, which proof is admitted for voting by the official receiver, will not, while an appeal against the decision of the official receiver is pending, be allowed to withdraw the proof conditionally; but leave may be given to the creditor to amend the proof by revaluing his security. *In re* CLARK. *Ex parte* BUENOS AYRES AND PACIFIC RAILWAY COMPANY - - - - **Wright J. 655**

BASTARDY—*Affiliation Order — Application by Married Woman living with Husband at Date of Application — Bastardy Laws Amendment Act*, 1872 (35 & 36 *Vict. c.* 65), *s.* 3.

A married woman, who at the date of the application is living with her husband, cannot obtain an order for the affiliation of her bastard child under the Bastardy Laws Amendment Act, 1872, s. 3. JONES *v.* DAVIES - **Div. Ct. 118**

BETTING—Gambling partnership — Bets paid by one partner—Claim for contribution *See* GAMING. 2. **11**

—— Office used for—"Coupon competition"—Events relating to horse-races - **177** *See* GAMING. 1.

BILL OF LADING — Description of goods — Mistake - - - - **548** *See* SHIPPING.

BILL OF SALE—*Validity—Form in Schedule—Bill of Sale given by two Grantors—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9, *Sched.*

A bill of sale given by two or more grantors, who are not jointly interested in any of the goods comprised therein, but each of whom is the sole owner of a portion of the goods, is void, as not being in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882. SAUNDERS *v.* WHITE **Div. Ct. 70**

BREACH OF TRUST—Voluntary restitution on eve of bankruptcy—Fraudulent preference - - - - - **710** *See* BANKRUPTCY. 6.

BUILDING — Advertisement sign attached to building—Offences—Limitation of time for commencement of proceedings. **580** *See* LONDON. 1.

—— Hospital—"Public purpose" — Home for defective children. - - **668** *See* LONDON. 2.

BUILDING CONTRACT—*Architect's Certificate—Architect in Position of Arbitrator—Negligence.*

A building owner employed an architect for

BUILDING CONTRACT—*continued*
reward to supervise the erection of certain houses by a contractor. The building contract provided for payments on account of the price of the works during their progress, and for payment of the balance after their completion, upon certificates of the architect, and that a certificate of the architect, shewing the final balance due or payable to the contractor, should be conclusive evidence of the works having been duly completed, and that the contractor was entitled to receive payment of the final balance:—

Held, by A. L. Smith M.R. and Collins L.J., Romer L.J. dissenting, that the architect, in ascertaining the amount due to the contractor and certifying for the same under the contract, occupied the position of an arbitrator, and therefore was not liable to an action by the building owner for negligence in the exercise of those functions. CHAMBERS *v.* GOLDTHORPE. RESTELL *v.* NYE - - - - - C. A. 624

2. —— *Specific Performance—Land Conveyed in Consideration of Contract to Build—Defined Works—Damages not adequate Compensation—Exception from General Rule as to Building Contracts.*

The plaintiffs, an urban sanitary authority, in pursuance of a scheme of street improvement, sold and conveyed to the defendant a plot of land abutting on a street, the defendant covenanting with them that he would erect buildings thereon within a certain time. The nature of the buildings to be erected was not precisely specified by the covenant, but subsequently, in consideration of the plaintiffs' giving the defendant further time for performance of his obligation to erect buildings, he agreed to erect on the land eight houses in accordance with certain plans, submitted by him to, and approved by the plaintiffs, which definitely shewed the nature and particulars of the houses to be erected. The defendant failing to perform this last-mentioned agreement, the plaintiffs brought an action against him claiming specific performance:—

Held, that the case came within the class of cases which has been recognised by the Courts as forming an exception to the general rule that specific performance of a building contract will not be ordered, and that an order ought to be made against the defendant for specific performance of his contract to build houses in accordance with the before-mentioned plans. WOLVERHAMPTON CORPORATION *v.* EMMONS - C. A. 515

CAPITAL—Stamp duty—Railway company—Increase of nominal capital - 220
See REVENUE. 8.

CASES—*Bathurst (Borough of)* v. *Macpherson*, (1879) 4 App. Cas. 256, explained 590
See SEWERS.

—— *Bolton Partners* v. *Lambert*, (1889) 41 Ch. D. 295, distinguished - - - 683
See CORPORATION.

—— *Brigella, The*, [1893] P. 189, not followed
See INSURANCE, MARINE. 147

—— *Dagnall, In re*, [1896] 2 Q. B. 407, approved
See BANKRUPTCY. 2. 309

CASES—*continued.*

—— *Genese, In re*, (1885) 16 Q. B. D. 700 480
See BANKRUPTCY. 9.

—— *Goldhill* v. *Clarke*, (1893) 68 L. T. 414, disapproved of - - - 76
See PRACTICE. 2.

—— *Lovejoy* v. *Cole*, [1894] 2 Q. B. 861, followed
See PRACTICE. 2. 76

—— *Municipal Council of Sydney* v. *Bourke*, [1895] A. C. 433, explained - 590
See SEWERS.

—— *Nicholson* v. *Bower*, (1858) 1 E. & E. 172, discussed - - - - 774
See SALE OF GOODS. 2.

—— *Reg.* v. *Portugal*, (1885) 16 Q. B. D. 487, approved and followed - - 472
See CRIMINAL LAW. 1.

—— *Rex* v. *Simpson*, (Mich. 11 Geo. 1) 1 Str. 609, discussed - - - - 396
See ECCLESIASTICAL LAW. 1.

—— *Rogers* v. *Whiteley*, [1892] A. C. 118, applicable - - - - 102
See COUNTY COURT. 3.

—— *Salton* v. *New Beeston Cycle Co.*, [1899] 1 Ch. 775, approved - - 613
See COMPANY. 2.

—— *Sharp* v. *Jackson*, [1899] A. C. 419, 426, dictum in, questioned - - 710
See BANKRUPTCY. 6.

—— *Swabey* v. *Port Darwin Gold Mining Co.*, (1889) 1 Meg. 385, distinguished 613
See COMPANY. 2.

—— *Tatam* v. *Reeve*, [1893] 1 Q. B. 44, approved of - - - - - 11
See GAMING. 2.

—— *West Ham* v. *London County Council*, [1893] A. C. 562, discussed - - 406
See RATES. 3.

—— *White* v. *Bywater*, (1887) 19 Q. B. D. 582, followed - - - - 437
See ADULTERATION.

CERTIFICATE—Architect's—Architect in position of arbitrator—Negligence - 624
See BUILDING CONTRACT. 1.

—— Charity Commissioners—National School—Action by transferee - - 430
See CHARITY.

CHARGE — Debentures, Contract to issue — Execution creditor—Priority - 771
See COMPANY. 1.

CHARITY—*Administration—National School—Income of Endowments—Transfer to School Board—Action by Transferee—Certificate of Charity Commissioners — Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *s.* 17 — *Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *s.* 23.

The buildings and the income of the endowments of a National School were leased by the managers to a school board, under the powers given by s. 23 of the Elementary Education Act, 1870, for a term of years. At a subsequent date the then trustee of the endowments transferred them to the Charity Commissioners, and the defendants, as official trustees of charitable trusts,

CHARITY—*continued.*
received the income arising from the funds. The school board brought an action against the defendants to recover the sums so received by them and for an inquiry as to the trust funds:—

Held, affirming the judgment of a Divisional Court, that the claim of the plaintiffs was under the trusts affecting the endowments and not a relief sought adversely to a charity, and that they were not entitled to bring the action without the consent of the Charity Commissioners under s. 17 of the Administration of Charitable Trusts Act, 1853. LLANBADARNFAWR SCHOOL BOARD *v.* OFFICIAL TRUSTEES OF CHARITABLE FUNDS **C. A. 430**

CHURCHWARDEN—Admission of—Archdeacon, Duty of—Power of bishop to inhibit *See* ECCLESIASTICAL LAW. 1. **396**

—— Election of parishioners' churchwarden—Right of incumbent to vote at - **573** *See* ECCLESIASTICAL LAW. 2.

CLERK—Presentation of bankruptcy petition by "officer" of company - - **476** *See* BANKRUPTCY. 8.

COAL MINE—Abandonment—Notice to Secretary of State—Neglect to send—Offence—Limitation of time - - - **493** *See* MINES. 1.

—— Mine-owner, Liability of—Contractor—Contract by workman with mine-owner to obey regulations - - **756** *See* EMPLOYER AND WORKMAN. 11.

—— Statutory rules and orders—Validity—Condition precedent - - - **673** *See* STATUTORY RULES AND ORDERS.

COLLECTING SOCIETIES AND INDUSTRIAL ASSURANCE COMPANIES—Life insurance—Notice of transfer - - **528** *See* INSURANCE, LIFE.

COMMERCIAL LIST—Appeal—Practice - **7** *See* PRACTICE. 1.

COMMITTAL—Extradition treaty with Germany—Additional charges more than two months after apprehension - **764** *See* EXTRADITION.

—— Workmen's compensation—Default in payment—Committal order, Jurisdiction to make - - - - **31** *See* EMPLOYER AND WORKMAN. 8.

COMPANY—*Debentures, Contract to issue—Charge—Execution Creditor—Priority.*

Where a company contracts for consideration to issue debentures charging its property, and before the debentures are actually issued goods intended to be thereby charged are seized in execution of a judgment recovered against the company, the execution creditor is only entitled to the goods subject to a charge in favour of the intended debenture-holders. SIMULTANEOUS COLOUR PRINTING SYNDICATE *v.* FOWERAKER **Wright J. 771**

2. —— *Director—Remuneration—Yearly Payment.*

Articles of association of a limited company provided that the directors should be paid out of the funds of the company by way of remuneration for their services "the sum of 125*l.* per annum, per director, and such further sums as shall from time to time be determined by the company in general meeting, and the same shall be divided among them in such proportion and manner as the directors by agreement may determine and in default of such determination equally." In an action by a director, who had resigned after serving for a part of a year, to recover remuneration in respect of his services during that period:—

Held, that the articles of association did not entitle a director to recover remuneration for any less period than a year.

Salton v. *New Beeston Cycle Co.*, [1899] 1 Ch. 775, approved.

Swabey v. *Port Darwin Gold Mining Co.*, (1889) 1 Meg. 385, distinguished. INMAN *v.* ACKROYD & BEST, LIMITED - - - **C. A. 613**

—— Bankruptcy petition—Presentation by "officer" of the company—Clerk **476** *See* BANKRUPTCY. 8.

—— Income tax—Profits or gains—Interest from foreign investments - - **153** *See* REVENUE. 5.

COMPENSATION—Workmen's Compensation Act. *See* Cases under EMPLOYER AND WORKMAN.

CONDITION PRECEDENT—Order of Secretary of State—Notice of making of order **673** *See* STATUTORY RULES AND ORDERS.

CONFLICT OF LAWS—*Assignment for Benefit of Creditors—Deed executed Abroad—Title to Goods in England—Registration—Deeds of Arrangement Act*, 1887 (50 & 51 *Vict. c.* 57).

A trustee under a deed of assignment for the benefit of creditors, executed by a foreign debtor in the country of his domicil, and valid by the law of that country, can establish in the Courts of this country a good title, as against an execution creditor, to goods in this country, belonging, at the date of the assignment, to the debtor, although the deed has not been registered pursuant to the Deeds of Arrangement Act, 1887. DULANEY *v.* MERRY & SON - **Channell J. 536**

CONTRACT—Building contracts. *See* Cases under BUILDING CONTRACT.

—— Goods not according to specification—Right to reject—Stipulation against rejection *See* SALE OF GOODS. 1. **608**

—— Sale of goods—Passing of property under unenforceable contract - - **774** *See* SALE OF GOODS. 2.

—— To issue debentures—Charge—Execution creditor—Priority - - - **771** *See* COMPANY. 1.

—— With partnership—Death of partner—When contract terminated by - - **59** *See* PARTNERSHIP.

CONTRACTOR—Mine-owner, Liability of—Contractor—Contract by workman with mine-owner to obey regulations - **756** *See* EMPLOYER AND WORKMAN. 11.

CONTRACTOR—*continued.*

—— Workmen's compensation—"Engineering work" - - - - 780
See EMPLOYER AND WORKMAN. 4.

CONTRIBUTION—Gambling partnership—Agreement by way of gaming or wagering—Bets paid by one partner—Claim for contribution - - - 11
See GAMING. 2.

"CONVEYANCE ON SALE"—Stamp—Sale, What amounts to—Minerals under railway
See REVENUE. 6. 416

CORPORATION — *Election — Town Councillor—Disqualification—Contract with Council—Release by Committee—Ratification by Council—Relation—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 12, *sub-s.* 1 (*c*).

A petition was presented against a town councillor, alleging that his election was void on the ground that, at the date of his nomination, he had an interest in a contract with the council.

The respondent, in answer to an advertisement, had offered to supply to the council, for twelve months, certain goods at specified prices, and the offer was accepted. Afterwards he applied to a committee of the council to be released from his contract. The committee resolved that, subject to approval by the council, he be released from that date. He was then nominated. After his nomination the council approved the resolution of the committee releasing him.

On argument of questions of law reserved:—

Held, that the advertisement, tender, and acceptance constituted a contract, that the respondent had an interest in the contract, that the ratification, after the respondent's nomination, of the resolution releasing him did not relate back to the date of the resolution, because the interests of persons other than the parties to the contract might be affected, and therefore the respondent, at the date of his nomination, had an interest in a contract with the council, and was disqualified, and his election was void.

Bolton Partners v. *Lambert*, (1889) 41 Ch. D. 295, distinguished. *In re* GLOUCESTER MUNICIPAL ELECTION PETITION, 1900 (TUFFLEY WARD). FORD *v.* NEWTH - - - **Div. Ct. 683**

COSTS—County court—Sum less than 10*l.* recovered in action founded on tort 76
See PRACTICE. 2.

—— Misconduct — Administration actions — Agreement to share profit costs between solicitors who represent different conflicting interests - - - 187
See SOLICITOR.

COUNCILLOR — Election — Disqualification — Town councillor—Contract with council
See CORPORATION. 683

COUNTY COURT—*Affidavit, Form of—Insufficiency of Affidavit—Jurisdiction—Application for Judgment Summons—Prohibition—County Court Rules*, 1889, *Order* XXV., *rr.* 13, 14*a*, *Appendix H., Form* 52A.

An affidavit, in support of an application for leave to issue a judgment summons out of the district of the county court in which judgment had been obtained, stated that the defendant lived in a house apparently of the yearly value of 60*l.*, and carried on business as a builder, but it did not state any circumstances shewing that the business was profitable, or that the defendant had means to pay, nor did it state whether the defendant was married, and if so whether he had children. The county court judge gave leave to issue the summons. On an application for a writ of prohibition:—

Held, that the affidavit was not in accordance with Form 52A of Appendix H to the County Court Rules, 1889, and was therefore insufficient to give the county court judge jurisdiction under Order XXV., r. 14*a*, of those rules. MCINTOSH *v.* SIMPSON - - - - - **C. A. 487**

2. —— *Affidavit for leave to issue Judgment Summons against Partner—Practice—Judgment against Firm — County Court Rules, App. H, Form* 52 (*c*).

By the County Court Rules, Order XXV., r. 14 (*b*), it is provided that where a judgment is recovered against a firm, and the plaintiff seeks to enforce it by judgment summons against a person whom he alleges to be a partner in the firm, he shall file an affidavit in Form 52 (*c*), and thereupon a judgment summons shall issue. Paragraph 2 of Form 52 (*c*) is as follows: "I am informed and believe [*state the sources of information and grounds of belief*] that G. H. was at the date of judgment a partner in the said firm of C. D. & Co.":—

Held, that the statement of the plaintiff's sources of information and grounds of belief that the person against whom the judgment summons is sought was a partner is a material part of the form, and that its omission from the affidavit will render irregular the issue of the summons and all subsequent proceedings thereon. LUMLEY *v.* OSBORNE - - - - **Div. Ct. 532**

3. —— *Garnishee Summons—Attachment of Debt—Balance in hands of Garnishee—Practice.*

The decision in *Rogers* v. *Whiteley* [1892] A. C. 118, that a garnishee order in the ordinary form in the High Court attaches the whole of the money due from the garnishee to the judgment debtor, even although that amount exceeds the judgment debt, applies to a garnishee summons in the ordinary form in the county court. YATES *v.* TERRY - - - - **Div. Ct. 102**

—— Costs—Sum less than 10*l.* recovered in action founded on tort - - - 76
See PRACTICE. 2.

—— Workmen's Compensation Act.
See Cases under EMPLOYER AND WORKMAN.

COUNTY COURT RULES, 1889, Order XXV., rr. 13, 14a, Appendix H., Form 52a 487
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See COUNTY COURT. 2.

"COUPON COMPETITION" — Office used for betting—Events relating to horse-races.
See GAMING. 1. 177

CREDITORS—Bankruptcy practice.
See Cases under BANKRUPTCY.

CRIMINAL LAW—*Fraudulent Misappropriation by Agent*—"*Banker, Merchant, Broker, Attorney, or other Agent*"—*Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 75.

By 24 & 25 Vict. c. 96, s. 75, "Whosoever, having been intrusted, either solely, or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any money or security for the payment of money, with any direction in writing to apply, pay, or deliver such money or security or any part thereof respectively, or the proceeds or any part of the proceeds of such security, for any purpose, or to any person specified in such direction, shall, in violation of good faith, and contrary to the terms of such direction, in anywise convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such money, security, or proceeds, or any part thereof respectively . . . . shall be guilty of a misdemeanour."

The prisoner, a conjuror and thought-reader, received from the prosecutrix a cheque for the specific purpose of paying a deposit upon an application on behalf of the prosecutrix for shares in a certain railway company, the cheque to be returned to the prosecutrix in the event of the shares not being obtainable. The prisoner made no application for the shares, but cashed the cheque and misappropriated the proceeds:—

Held, that the words "or other agent" in s. 75 applied only to persons whose occupation was similar to those enumerated in the section, and did not include any ordinary agent who might from time to time be intrusted with chattels or valuable securities, and that the facts disclosed no offence within the meaning of the section.

Reg. v. *Portugal*, (1885) 16 Q. B. D. 487, approved and followed. THE QUEEN *v.* KANE
C. C. R. 472

2. —— *Practice—Sentence—Hard Labour—Common Law Forgery*—"*Any Cheat or Fraud punishable at Common Law*"—*Criminal Procedure Act*, 1851 (14 & 15 *Vict. c.* 100), *s.* 29.

The prisoner was tried for the common law misdemeanour of forging and uttering writings with intent to defraud. He had fraudulently misappropriated money which he had collected and received from one Cobb. An order was made in a county court that he should render an account of the money received. He delivered papers in which the donors had entered their names and the amounts they had handed him. He had altered the entries so as to make it appear that smaller amounts had been given. It was not alleged that Cobb had been defrauded or prejudiced, except so far as it appeared that he had been deprived by the prisoner's conduct of the evidence to support his claim. On a case stated, reserving the question, whether there was power to pass a sentence of imprisonment with hard labour:—

Held, that, as the indictment charged only a common law forgery, without alleging that any one was thereby defrauded, the case did not come within the Criminal Procedure Act, 1851, s. 29, by which persons convicted of "any cheat or fraud punishable at common law" may be sentenced to hard labour. THE KING *v.* HAMILTON
C. C. R. 740

—— Extradition treaty with Germany—Committal—Additional charges more than two months after apprehension - 764
See EXTRADITION.

DAMAGES—"Liquidated sum"—Act of bankruptcy—"Notice"—Debt - 51
See BANKRUPTCY. 3.

DEATH—Partner—When contract with partnership terminated by death - - 59
See PARTNERSHIP.

DEBENTURES—Contract to issue — Charge — Execution creditor—Priority - 771
See COMPANY. 1.

DEBT—Attachment of—Balance in hands of garnishee—Practice — Garnishee summons - - - - - 102
See COUNTY COURT. 3.

DEBTORS ACT—Workmen's compensation—Default in payment — Committal order, Jurisdiction to make - - 31
See EMPLOYER AND WORKMAN. 8.

DEDUCTIONS—Workmen's compensation—Average weekly earnings—Deductions from wages - - - - 93
See EMPLOYER AND WORKMAN. 2.

DEEDS OF ARRANGEMENT—Deed executed abroad—Title to goods in England—Registration - - - 536
See CONFLICT OF LAWS.

DIRECTOR—Remuneration—Yearly payment
See COMPANY. 2. 613

DISCLAIMER—Lease determined as between lessor and lessee—Surety for lessee 660
See BANKRUPTCY. 5.

DISCRETION—Adjudication—Annulment—Discretion to refuse order - - 744
See BANKRUPTCY. 4.

DISQUALIFICATION—Election—Town councillor—Contract with council - 683
See CORPORATION.

DIVIDED PARISHES—Pauper—Settlement 720
See POOR LAW. 1.

DRUGS—Sale of food and drugs — Standard strength of drugs - - - 437
See ADULTERATION.

DUTY—Public revenue.
See Cases under REVENUE.

EARNINGS—Workmen's compensation—Average weekly earnings - 86, 93, 96
See EMPLOYER AND WORKMAN. 1, 2, 3.

ECCLESIASTICAL LAW—*Churchwarden, Admission of—Archdeacon, Duty of—Triennial Visitation of Bishop—Power of Bishop to Inhibit—Ministerial Act.*

Where an archdeacon was inhibited during

ECCLESIASTICAL LAW—*continued.*
the period of the bishop's triennial visitation from exercising any spiritual or ecclesiastical jurisdiction concerning, among other things, the admission of churchwardens:—

Held (reversing the order of a Divisional Court, [1901] 1 Q. B. 66), that it was not the duty of the archdeacon during the period covered by the inhibition to admit a churchwarden, and therefore he could not be ordered by mandamus to do so.

Rex v. *Simpson*, (Mich. 11 Geo. 1) 1 Str. 609, discussed. THE QUEEN *v.* SOWTER - C. A. 396

2. —— *Churchwarden—Election of Parishioners' Churchwarden—Right of Incumbent to Vote at — Canon* 89 — *Sturges Bourne's Act* (58 *Geo.* 3, *c.* 69), *s.* 3.

An incumbent of a parish, who, upon the failure of himself and the parishioners to agree upon the choice of churchwardens, exercises his right of appointing one churchwarden, is not entitled either by the common law or under s. 3 of Sturges Bourne's Act to vote in his capacity as a ratepayer at the election of the second churchwarden.

Query, whether the minister is entitled as such to preside at the election of the parishioners' churchwarden, and in the event of the votes being equal to give a casting vote? THE KING *v.* BISHOP OF SALISBURY - - - Div. Ct. 573

EDUCATION—National School—Income of endowments—Transfer to school board—Action by transferee — Certificate of Charity Commissioners - - 430
See CHARITY.

—— School board—Money raised by rate—Limitation to payment for elementary education - - - - 726
See SCHOOLS.

ELECTION—Parishioners' churchwarden—Right of incumbent to vote at - - 573
See ECCLESIASTICAL LAW. 2.

—— Town councillor — Disqualification — Contract with council - - - 683
See CORPORATION.

ELEMENTARY EDUCATION—School board 726
See SCHOOLS.

EMPLOYER AND WORKMAN—*Compensation—Average Weekly Earnings—Continuous Employment—Employment for Two Days a Week—Earnings outside Employment—Work for same or other Employers—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), 1*st Schedule* (1), (*b*).

A workman was under an agreement to work for his employers on the nights of Thursday and Friday in each week, for a period extending over two weeks, and at a fixed rate of wages for each night. During the rest of each week he worked at times for the same employers, when they had work to give him, and at other times for other firms carrying on a similar business to that of the employers. The workman was injured during the third week of his employment under the agreement. He claimed compensation under the Workmen's Compensation Act, 1897, and an award was made in his favour based on the weekly wages earned by him in respect of the

EMPLOYER AND WORKMAN—*continued.*
two nights a week during which he worked under the agreement. On appeal:—

Held, that the employment for two nights a week was a continuous one, and that the earnings on those two nights were properly taken into account in determining the weekly payment to be made to the applicant:—

Held, also, that the amount received for casual work done for the same or different employers could not be taken into account in estimating the average weekly earnings of the applicant. HATHAWAY *v.* ARGUS PRINTING COMPANY - - - - - C. A. 96

2. —— *Compensation—Average Weekly Earnings—Deductions from Wages—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), 1*st Schedule*, (1), (*a*).

By the rules of a colliery company 6*d.* a week was deducted from the wages of each miner for lamp oil supplied by the employers. On an application for compensation under the Workmen's Compensation Act, 1897, the county court judge took as the basis of his award the full weekly wages of the injured miner without regard to the weekly deduction therefrom. On appeal:—

Held, that the principle on which the award was based was correct. HOUGHTON *v.* SUTTON HEATH AND LEA GREEN COLLIERIES COMPANY C. A. 93

3. —— *Compensation—Average Weekly Earnings before Accident—Review of Weekly Payment—Average Amount Workman able to Earn after Accident—Apprentice—Value of Tuition—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), 1*st Schedule* (2), (12).

An apprentice sustained an injury to his right hand which prevented his working as a skilled artisan, and the indenture of apprenticeship was cancelled. On an application for compensation under the Workmen's Compensation Act, 1897, he obtained an award of a weekly payment based on his wages for the previous year. He returned to the employment of the same employers as a workman, at weekly wages higher than his wages at the time of the accident, but less than those that would be ordinarily paid to a workman employed on the same class of work, since the injury he had sustained affected his ability to earn full wages. On an application by the employers for the review and termination of the weekly payment, the county court judge dismissed the application, on the ground that the workman was earning less, by a sum equal to the amount of the weekly payment awarded, than if he had had the use of his right hand. On appeal:—

Held, that, on a review of a weekly payment made by award under the Act, the test to be applied is the difference between the amount of the average earnings before the accident and the average amount which the workman is able to earn after the accident; that in the absence of evidence of advantages incidental to the employment, and capable of being appraised at a money value, the earnings before the accident must be determined by the wages received; that the county court judge was therefore wrong in

EMPLOYER AND WORKMAN—*continued.*

refusing to review the weekly payment; but that the weekly payment should be continued at a nominal amount, in order to preserve the right of the applicant to make any further application that might become necessary.

Semble, that the value of the tuition given to an apprentice should not be taken into account in arriving at the amount of his average weekly earnings. POMPHREY *v.* SOUTHWARK PRESS
C. A. 86

4. —— *Compensation*—"*Engineering Work*"—*Machinery worked by Hand Power—Contractor—Work ancillary or incidental to, and being no part of, or process in, a Business—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 4; *s.* 7, *sub-s.* 2.

A firm of engineers contracted with the owners of a cotton-spinning factory to put a new driving wheel into the steam-engine belonging to the factory. While engaged in the work of fixing the new wheel, a workman employed by the engineers met with an accident which caused his death:—

Held, that, the work being merely ancillary or incidental to, and no part of, or process in, the business of the owners of the cotton-spinning factory, the case did not come within s. 4 of the Workmen's Compensation Act, 1897; and therefore that a dependant of the deceased workman was not entitled to compensation under the Act against the owners of the cotton-spinning factory. WRIGLEY *v.* BAGLEY & WRIGHT AND WHITTAKER & SONS - - - **C. A. 780**

5. —— *Compensation*—"*Factory*"—*Quay, Ship alongside of*—"*Undertakers*"—"*Actual Use or Occupation*"—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-ss.* 1, 2—*Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *s.* 23, *sub-s.* 1.

Where the owners of a ship moored alongside of a quay, who acted as their own stevedores, had the use of the portion of the quay alongside of which their ship lay, for the purpose of unloading the ship's cargo on to the quay, and a workman employed by them was killed through an accident arising out of and in the course of his employment on the quay:—

Held, that the shipowners, having the "actual use" of a portion of the quay within the meaning of the Factory and Workshop Act, 1895, s. 23, sub-s. 1, were "undertakers" in respect of a factory within the meaning of the Workmen's Compensation Act, 1897, s. 7, and liable to make compensation to the dependants of the workman under that Act. MERRILL *v.* WILSON, SONS & CO.
C. A. 35

6. —— *Compensation*—"*Factory*"—*Steam-engine used on Farm—Meal ground as Food for Stock*—"*By way of Trade or for Purposes of Gain*"—*Factory and Workshop Act*, 1878 (41 & 42 *Vict. c.* 16), *s.* 93—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2.

Where a workman, who was employed by a farmer on his farm to drive a movable steam-engine, for the purpose of working a mill for grinding meal intended to be used for food for stock on the farm, and not for sale, was injured

EMPLOYER AND WORKMAN—*continued.*

by an accident arising out of and in the course of that employment:—

Held, that the workman was not employed on, in, or about a "factory" within the meaning of the Factory and Workshop Act, 1878, s. 93, and therefore was not entitled to compensation under the Workmen's Compensation Act, 1897, in respect of the injuries occasioned to him as before mentioned. NASH *v.* HOLLINSHEAD - **C. A. 700**

7. —— *Compensation — Machinery used in loading from a Quay—Occupier—Person using Machinery*—"*Undertaker*"—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7—*Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *s.* 23, *sub-s.* 1.

The person using machinery in the process of loading a ship from a quay is an occupier of a factory within s. 23, sub-s. 1, of the Factory and Workshop Act, 1895, and therefore an "undertaker" within the Workmen's Compensation Act, 1897, s. 7. CARRINGTON *v.* BANNISTER & CO.
C. A. 20

8. —— *Compensation—Practice—Default in Payment of Compensation—Committal Order, Jurisdiction to make*—"*Enforceable as a County Court Judgment*"—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. II.* (8)—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5.

The memorandum of the compensation awarded by an arbitrator under the Workmen's Compensation Act, 1897, when recorded in the manner prescribed by Sched. II. (8) of the Act, may be enforced by an order of committal under the Debtors Act, 1869, s. 5. BAILEY *v.* PLANT
C. A. 31

9. —— *Compensation—Scaffolding, Building constructed by means of—Structure of Trestles and Boards within Building — Whether Scaffolding Question of Fact for Arbitrator—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

By s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897, the Act is to apply (inter alia) to employment "on, in, or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding."

A new house more than thirty feet high had been roofed in and the external scaffolding removed. The applicant was engaged in plastering the walls and ceiling in one of the rooms, and in order to reach his work was standing on a structure of trestles with boards on them. While at work in this manner he met with an accident, for which he claimed compensation. An arbitrator appointed by a county court judge decided that the structure was not a scaffolding and refused to make an award of compensation, but referred the matter to the county court judge, who reversed the decision of the arbitrator and awarded the compensation provisionally settled by the arbitrator. On appeal:—

Held, that the question whether the structure was a scaffolding or not was a question of fact for the arbitrator, and that his finding was not open to review. FERGUSON *v.* GREEN - **C. A. 25**

10. —— *Practice—Appeal—Compensation—Refusal to order Payment by Insurers into Savings*

EMPLOYER AND WORKMAN—*continued.*

Bank — Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 5, *sub-s.* 1, *Second Schedule, cl.* (4).

An appeal will not lie to the Court of Appeal under clause (4) of the Second Schedule to the Workmen's Compensation Act, 1897, against the refusal of a county court judge to direct insurers to pay insurance money into the Post Office Savings Bank in accordance with the provisions of sub-s. 1 of s. 5 of the Act. LEECH *v.* LIFE AND HEALTH ASSURANCE ASSOCIATION - C. A. 707

11. —— "*Workman*"—*Person employed in Coal Mine by Contractor—Contract by Workman with Mine-owner to obey Regulations—Liability of Mine-owner — Coal Mines Regulation Act*, 1887 (50 & 51 *Vict. c.* 58)—*Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 10—*Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 8.

By s. 8 of the Employers' Liability Act, 1880, the expression "workman" means any person to whom the Employers and Workmen Act, 1875, applies; and by s. 10 of the Act of 1875, a "workman" means "any person who, being a labourer . . . . miner, or otherwise engaged in manual labour, ... has entered into or works under a contract with an employer, whether the contract be . . . . express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour."

The owners of a colliery entered into an agreement with a contractor by which the latter contracted to sink and wall a shaft in the colliery. One of the men employed upon the work by the contractor and paid by him was fatally injured by an explosion of gas in the mine. The deceased had, in common with all the men employed by the contractor, signed the "record book" kept by the colliery owners, by which, in consideration of being employed at the mine, he became bound to observe the regulations and conditions laid down for the safety of the mine and for the guidance of the persons employed there. The administrator of the deceased having brought an action against the colliery owners under the Employers' Liability Act, 1880, to recover damages for his death:—

Held, that the signature of the conditions by the deceased did not create a contract of service between himself and the colliery owners; that the deceased was therefore not a "workman" who had entered into or worked under a contract with the colliery owners as his employers within the meaning of s. 10 of the Employers and Workmen Act, 1875, and that the Employers' Liability Act, 1880, did not apply. FITZPATRICK *v.* EVANS & Co. - - - Div. Ct. 756

— False imprisonment — Evidence of implied authority—Manager of public-house *See* MASTER AND SERVANT. 390

"ENGINEERING WORK" — Workmen's compensation - - - - 780
See EMPLOYER AND WORKMAN. 4.

ESTATE DUTY—Public revenue 123, 228, 285, 297
See REVENUE. 1—4.

EVIDENCE—Implied authority—False imprisonment—Manager of public-house - 390
See MASTER AND SERVANT.

EVIDENCE—*continued.*

—— Merchandise marks—"Trade description"—Unintelligible writing explained by oral statement - - - - 1
See TRADE-MARK.

—— No evidence of actual injury—Ventilation
See FACTORY ACTS. 2. 434

EXECUTION CREDITOR—Priority—Contract to issue debentures—Charge - - 771
See COMPANY. 1.

EXEMPTION — From taxes and assessments—City of London—Consolidated rate 617
See STATUTE.

—— Land tax—Hospitals—Land in occupation of tenants - - - - 364
See LAND TAX.

EXPECTANCY — Interest in—Estate duty—Incumbrances created by reversioner — Deductions - - - - 297
See REVENUE. 1.

EXTRADITION — *Criminal Law — Committal—Additional Charges more than Two Months after Apprehension—Extradition Treaty with Germany, arts.* 9, 12.

By art. 9 of the extradition treaty with Germany, where a fugitive criminal is arrested upon a request for extradition, the preliminary investigation of the case is to be conducted as if the apprehension had been for a crime committed in the same country, and by art. 12 the fugitive is to be set at liberty if sufficient evidence for his extradition is not produced within two months from the date of his apprehension.

A fugitive criminal was arrested on December 15 on a warrant issued upon an information charging him with obtaining money by false pretences within the jurisdiction of the German Empire, and was remanded from time to time until the following February 14, when evidence was given upon one charge, which in the opinion of the magistrate was sufficient to justify the committal of the prisoner for trial if the crime had been committed in this country. The prosecution having intimated an intention to prefer additional charges, the necessary papers in which had only reached the magistrate on the previous day, the magistrate did not then commit the prisoner for extradition, but further remanded him until February 21, when evidence was taken upon thirty-one additional charges, and the prisoner was committed for extradition upon the original charge and thirty of the additional charges. Upon an application for a habeas corpus:—

Held, that there was in fact upon the depositions sufficient evidence to justify the committal of the prisoner upon the original charge on February 14, and that the prisoner was therefore not entitled to be set at liberty under art. 12.

Semble, per Channell and Bucknill JJ., that, sufficient evidence upon the original charge having been produced within two months of the arrest to justify a committal upon that charge, the magistrate was entitled after the expiration of the two months to receive evidence upon charges other than that on which the prisoner

EXTRADITION—*continued.*
had been arrested, and that the committal upon those charges was good. *In re* BLUHM
Div. Ct. 764

FACTORY—Workmen's compensation.
See Cases under EMPLOYER AND WORKMAN.

"FACTORY"—Workmen's compensation 35, 700
See EMPLOYER AND WORKMAN. 5, 6.

FACTORY ACTS — *Factory — Sanitary Conveniences, Provision of—Failure of Sanitary Authority to take Proceedings on Notice from Factory Inspector—Power of Factory Inspector to make requirement—Jurisdiction of Justices to inquire into Sufficiency of Sanitary Accommodation — Appeal to Quarter Sessions from Requirement of Factory Inspector — Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 38—*Factory and Workshop Act*, 1878 (41 & 42 *Vict. c.* 16), *s.* 4—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *ss.* 7, 22—*Factory and Workshop Act*, 1891 (54 & 55 *Vict. c.* 75), *s.* 2—*Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *ss.* 3, 35.

By the Factory and Workshop Act, 1891, s. 2, sub-s. 2, where notice of an act, neglect, or default is given by a factory inspector under s. 4 of the Factory and Workshop Act, 1878, to a sanitary authority, and proceedings are not taken within a reasonable time for punishing or remedying the act, neglect, or default, the inspector may take "the like proceedings for punishing or remedying the same as the sanitary authority might have taken." A factory inspector having given notice to a sanitary authority that there was a deficiency of sanitary accommodation in a certain factory within their district, and the sanitary authority not having taken within a reasonable time any proceedings for punishing or remedying the same, the inspector gave notice to the factory owner under this sub-section and under s. 22 of the Public Health Acts Amendment Act, 1890, which had been adopted in the district, requiring him to erect certain specified sanitary conveniences, and on his neglect to comply with the notice summoned him before justices in petty sessions:—

Held (by Lord Alverstone C.J., Grantham, Bruce, and Darling JJ., Phillimore J. dissenting), that the justices had no jurisdiction to inquire into the suitability or sufficiency of the sanitary accommodation existing at the factory, or required by the notice of the inspector.

Semble, that an appeal lies to quarter sessions under s. 7 of the Public Health Acts Amendment Act, 1890, from the requirement of the factory inspector in such a case. TRACEY *v.* PRETTY & SONS - - - - - Div. Ct. 444

2. —— *Factory—Ventilation—Dust generated and inhaled by Workers to Injurious Extent—No Evidence of Actual Injury—Factory and Workshop Act*, 1878 (41 & 42 *Vict. c.* 16), *s.* 36.

By s. 36 of the Factory and Workshop Act, 1878, where in any factory a process is carried on by which dust is "generated and inhaled by the workers to an injurious extent," the factory inspector has power to require a fan or other means

FACTORY ACTS—*continued.*
of ventilation to be provided. In proceedings under this section:—

Held, that it was not necessary to prove that any worker had sustained actual injury from inhaling the dust, but that it was sufficient if it was proved that dust was generated and inhaled by the workers to an extent that must in the long run be injurious. HOARE *v.* RITCHIE & SON
Div. Ct. 434

FALSE IMPRISONMENT—Evidence of implied authority—Manager of public-house
See MASTER AND SERVANT. 390

FARMING STOCK—Things quæ ipso usu consumuntur—Construction of will—Gift for life - - - - - 360
See WILL.

FENCE—Highway—Removal of protecting fence — Misfeasance — Liability of highway authority - - - - 45
See HIGHWAY. 1.

FINANCE ACT—Public revenue.
See Cases under REVENUE.

FIXTURES —*Mortgagor and Mortgagee—"Dog Grates" Substituted for Fixed Grates—Intention to Improve Inheritance.*

The mortgagor of a house, subsequently to the mortgage, removed the ordinary fixed grates from various rooms in the house and substituted for them "dog grates," which were of considerable weight, but were not physically attached to the structure of the house in any way:—

Held, that under the circumstances the true inference was that the mortgagor placed the dog grates in the house with the object of improving the inheritance, and that they were therefore fixtures which passed to the mortgagee. MONTI *v.* BARNES - - - - C. A. 205

FORGERY — Practice — Sentence—Hard labour —Common law forgery - - 740
See CRIMINAL LAW. 2.

FORMÂ PAUPERIS—Plaintiff suing in—Solicitor, Assignment of—Official solicitor
See PRACTICE. 3. 596

FRANCHISE—Registration of voters - 193
See PARLIAMENT.

FRAUD—Agent, Fraudulent misappropriation by —"Banker, merchant, broker, attorney, or other agent" - - - 472
See CRIMINAL LAW. 1.

FRAUDULENT PREFERENCE—Breach of trust —Voluntary restitution on eve of bankruptcy - - - - 710
See BANKRUPTCY. 6.

GAMING—"*Coupon Competition*"—*Events relating to Horse-races—Office used for Betting—Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *s.* 1.

The defendant was the occupier of an office and the proprietor of a newspaper published weekly at that office. Each number of the paper contained a notice of what was called a "coupon competition"—that is to say, of a promise by the defendant to pay a certain specified sum of money to such persons as should correctly guess

GAMING—*continued.*
the result of a certain horse-race then shortly about to be run, and should write their guesses upon certain forms called "coupons," which were issued with each number of the newspaper, and should return the coupons so filled up to the defendant's office, together with the sum of one penny in respect of each guess made. A large number of persons every week sent into the defendant's office coupons filled up as aforesaid, accompanied by remittances of money. The defendant was upon these facts convicted under the Betting Act, 1853, of having unlawfully kept the office for the purpose of money being received by her as the consideration for undertakings to pay thereafter money on events relating to horse-races.

Held, that the conviction was right. THE QUEEN *v.* STODDART - - **Div. Ct. 177**

2. —— *Gambling Partnership—Bets paid by one Partner — Claim for Contribution — Money paid in respect of Agreement void under the Gaming Act*, 1845 (8 & 9 *Vict. c.* 109)—*Agreement by way of Gaming or Wagering—Gaming Act*, 1892 (55 & 56 *Vict. c.* 9), *s.* 1.

Where one person advanced money to another for the purpose of making bets on horses on their joint account, and the money so advanced was lost on such bets:—

Held, that, by reason of the provisions of the Gaming Act, 1892, the person who had advanced the money could not maintain an action against the other for half of the amount so lost.

Tatam v. *Reeve*, [1893] 1 Q. B. 44, approved of. SAFFERY *v.* MAYER - - **C. A. 11**

GARNISHEE—Attachment of debt—Balance in hands of garnishee — Practice — Garnishee summons - - - **102**
See COUNTY COURT. 3.

GENERAL AVERAGE—Assured owner both of ship and cargo — Liability of underwriters - - - - **147**
See INSURANCE, MARINE.

GERMANY — Extradition treaty with — Committal—Additional charges more than two months after apprehension - **764**
See EXTRADITION.

GOODS — Contract — Goods not according to specification—Right to reject—Stipulation against rejection - - **608**
See SALE OF GOODS. 1.

—— Sale of goods—Passing of property under unenforceable contract - - **774**
See SALE OF GOODS. 2.

GRATES — Mortgagor and mortgagee — "Dog grates" substituted for fixed grates—Intention to improve inheritance **205**
See FIXTURES.

GRAVEL—Sand—Mines and minerals—Quarries—Regulation of railways - **317**
See MINES. 2.

GRAVEL PITS—Exhaustion of subject-matter of assessment—Value of occupation when rate made—Poor-rate - - **272**
See RATES. 1.

HARD LABOUR—Sentence—Practice—Common law forgery - - - - **740**
See CRIMINAL LAW. 2.

HIGHWAY — *Dangerous Locality — Removal of protecting Fence—Misfeasance—Liability of Highway Authority—Local Government.*

A fence had been formerly erected, by the then existing highway authority, to protect the public using a highway which was dangerous, owing to its liability to be flooded by a stream that ran by the side of the road. The stream was diverted, but the ditch where the former bed of the stream had been was still liable to be filled in time of flood, and the water then flowed over the road. After the fence had been in existence for a number of years, the defendants, adopting the report of their surveyor that the fence was in bad repair, that it was no longer necessary, and that all that was required was the erection of a short length at each end, ordered that the work should be done. The fence was removed, and three weeks later and before any new fence had been put up the road was flooded. A man driving along the road drove into the ditch and was drowned. In an action by his administratrix to recover damages for his death, the jury found that the removal of the fence under the circumstances, and in the way in which it had been done, was inconsistent with reasonable regard for the safety of persons using the road. Judgment was given for the plaintiff. On appeal:—

Held, that the defendants were liable. WHYLER *v.* BINGHAM RURAL DISTRICT COUNCIL **C. A. 45**

2. —— *New or Substituted Highway — Formalities required by Highway Act*, 1835 — *Presumption of Compliance with, after Lapse of Time—Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *ss.* 23, 84, 85.

Upon the hearing by a court of summary jurisdiction, under s. 8 of the Private Street Works Act, 1892, of objections to the proposals of an urban sanitary authority as to works to be executed by them under the Act, on the ground that the street was a highway repairable by the inhabitants at large, it appeared that in 1842, pursuant to a resolution of the vestry, a new road was substituted for an older public highway repairable by the inhabitants at large; the old highway was then closed, and from that date the new road had been used by the public as a highway. Upon one occasion the new road had been repaired by the surveyor for the parish, though it was uncertain whether in so doing he had acted in his capacity of surveyor. No evidence was given that the formalities required by s. 23 of the Highway Act, 1835, in the case of new highways, or by ss. 84 and 85 in the case of substituted highways, had been complied with:—

Held, that there was evidence upon which the justices might properly find that the new road was a highway repairable by the inhabitants at large, and that the formalities required by the Highway Act, 1835, might after the lapse of time be presumed to have been complied with. LEIGH URBAN COUNCIL *v.* KING **Div. Ct. 747**

HOSPITAL—Land tax—Exemption—Land in occupation of tenants - - 364
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—— Public building—"Public purpose" 668
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HOUSE OF LORDS—Leave to appeal to—Bankruptcy—Practice - - - 710
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HUSBAND AND WIFE—Affiliation order—Application by married woman living with husband at date of application 118
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—— Bankruptcy—Proof of debt—Onus of proving whether money lent by wife for purpose of husband's business 480
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—— Married woman—"Carrying on" business separately from husband—"Absenting"—Act of bankruptcy—Receiving order
See BANKRUPTCY. 2. 309

IMPRISONMENT—False—Evidence of implied authority—Manager of public-house
See MASTER AND SERVANT. 390

INCOME TAX—Company—Profits or gains—Interest from foreign investments 153
See REVENUE. 5.

INDEMNITY—Right of indemnity over assets of trust—Lien passing to trustee in bankruptcy - - - - 108
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INHIBITION—Churchwarden, Admission of—Archdeacon, Duty of—Power of bishop to inhibit - - - - 396
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INJURY—No evidence of actual—Ventilation
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INN—False imprisonment—Evidence of implied authority—Manager of public-house
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INSOLVENCY.
See Cases under BANKRUPTCY.

INSURANCE—Estate duty—Policy of life insurance—Settled property - 285
See REVENUE. 2.

—— Workmen's compensation—Appeal—Refusal to order payment by insurers into savings bank - - - - 707
See EMPLOYER AND WORKMAN. 10.

INSURANCE, LIFE—*Transfer to another Company—Notice of Transfer—Person sought to be Transferred—Collecting Societies and Industrial Assurance Companies Act*, 1896 (59 & 60 *Vict. c.* 26), *s.* 4, *sub-s.* 2; *s.* 14, *sub-s.* 1.

The respondents, a collecting society within the Collecting Societies and Industrial Assurance Companies Act, 1896, were charged, under s. 14, sub-s. 1, with failing to give notice to the appellants, an industrial assurance company within the same Act, of an application of a person insured with the appellants for admission to the respondent society, contrary to s. 4, sub-s. 2. A collector, who had collected for the appellants, asked the assured to transfer to the respondents.

INSURANCE, LIFE—*continued.*

The assured signed a proposal form in the respondent society, and gave up to the collector his policies in the appellant company, receiving policies in the respondent society. The collector had left the appellants and become collector to the respondents. No notice was given.

The magistrate held that, as the policies in both societies were co-existent, there could be no legal transfer, or seeking to transfer, within the Act, and therefore no offence had been committed.

On a case stated:—

Held, that the assured was a person sought to be transferred, within the meaning of s. 4, sub-s. 2, and s. 14, sub-s. 1, and therefore the respondents had committed an offence under the Act. PEARL LIFE ASSURANCE COMPANY *v.* SCOTTISH LEGAL LIFE ASSURANCE SOCIETY, LIMITED - **Div. Ct. 528**

INSURANCE, MARINE—*General Average—Assured Owner both of Ship and Cargo—Liability of Underwriters.*

A loss caused by the cutting away of a ship's mast for the safety of the whole adventure is a general average loss for which the underwriter of a policy of insurance on cargo against perils of the seas is liable although the assured is the owner both of ship and cargo, and, as between those interests, there is in fact no contribution to general average.

Judgment of Gorell Barnes J. in *The Brigella*, [1893] P. 189, not followed. MONTGOMERY & Co. *v.* INDEMNITY MUTUAL MARINE INSURANCE COMPANY - - - - **Mathew J. 147**

INTEREST—Income tax—Foreign investments—Company—Profits or gains - 153
See REVENUE. 5.

INTERPLEADER—Trustee in bankruptcy, Lien passing to—Right of indemnity over assets of trust - - - 108
See BANKRUPTCY. 7.

INVESTMENTS—Interest from foreign investments—Income tax—Company—Profits or gains - - - - 153
See REVENUE. 5.

JUDGMENT—Amendment—Error arising from accidental slip or omission—Item omitted from bill of costs - - - 694
See PRACTICE. 4.

JURISDICTION—County court—Affidavit, Form of—Insufficiency of affidavit—Prohibition - - - - - 487
See COUNTY COURT. 1.

—— Summary—Building—Advertisement sign attached to building—Projection—Offences—Limitation of time - 580
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—— Workmen's compensation—Default in payment—Committal order, Jurisdiction to make - - - - - 31
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JUSTICES—Affiliation order—Application by married woman living with husband at date of application - - 118
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—— Building—Projection—Advertisement sign attached to building - - 580
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—— Buildings—Hospital—"Public purpose"
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—— Coal mines — Abandonment — Notice to Secretary of State—Neglect to send—Offence—Limitation of time - 493
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—— Criminal law—Practice—Sentence—Hard labour—Common law forgery - 740
See CRIMINAL LAW. 2.

—— Extradition — Committal — Additional charges—Treaty with Germany - 764
See EXTRADITION.

—— Factory Acts.
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—— Highway—New or substituted highway—Formalities — Presumption — Lapse of time - - - - - 747
See HIGHWAY. 2.

—— Insurance—Life—Transfer to another company—Notice of transfer - - 528
See INSURANCE, LIFE.

—— Merchandise marks—"Trade description"—Unintelligible writing explained by oral statement - - - 1
See TRADE-MARK.

—— Minerals—Gravel and sand—Quarries—Regulation of railways - - 317
See MINES. 2.

—— Newstreet—Sewer—Metropolis Management Acts - - - - 264
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—— Pauper—Settlement—Divided parishes 720
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—— Pension—Special-duty allowance—"Annual pay" - - - 384
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—— Rates—Gravel pits—Exhaustion of subject-matter of assessment—Value of occupation when rate made - - 272
See RATES. 1.

—— Rates—Underground sewers—Diminution in value of surface—Poor-rate—Rateability - - - - 406
See RATES. 3.

—— Sale of food and drugs—Standard strength of drugs - - - - 437
See ADULTERATION.

—— Statutory rules and orders—Validity—Condition precedent - - - 673
See STATUTORY RULES AND ORDERS.

—— Streets—Paving expenses—Open spaces—"Owner" - - - - 501
See LONDON. 4.

—— Union, Alteration of—Apportionment of property—Annual sums payable to union
See POOR LAW. 2. 210

—— Vaccination—Neglect to procure—Information—Limitation of time - 497
See VACCINATION.

LAND TAX—*Hospitals—Exemption—Land in Occupation of Tenants—Land Tax Act*, 1797 (38 *Geo.* 3, *c.* 5), *s.* 25.

Any houses or lands, which on or before March 25, 1693, belonged to any of the hospitals mentioned by name in s. 25 of the Land Tax Act, 1797, are exempt from land tax, whether they form part of or are appurtenant to the sites of the hospitals or not, and whether they are in the occupation of the hospitals themselves or are let on lease to tenants. GOVERNORS OF ST. THOMAS', ST. BARTHOLOMEW'S AND BRIDEWELL HOSPITALS *v.* HUDGELL - - **Wills J. 364**

LANDLORD AND TENANT—Disclaimer—Lease determined as between lessor and lessee—Surety for lessee - - 660
See BANKRUPTCY. 5.

LARCENY — Fraudulent misappropriation by agent — "Banker, merchant, broker, attorney, or other agent" - - 472
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LIEN—Interpleader—Right of indemnity over assets of trust—Lien passing to trustee in bankruptcy - - - 108
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LIFE—Gift for — Will — Construction — Things quæ ipso usu consumuntur—Farming stock - - - - - 360
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LIFE INSURANCE.
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—— Estate duty—Policy—Settled property 285
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—— Transfer to another company—Notice of transfer - - - - 528
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"LIQUIDATED SUM"—Act of bankruptcy—Debt—"Notice" - - - 51
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LOCAL GOVERNMENT—Highway—Dangerous locality—Removal of protecting fence—Misfeasance—Liability of highway authority - - - - 45
See HIGHWAY. 1.

LONDON—*Buildings—Projection beyond General Line of Buildings in Street—Advertisement Sign attached to Building—Offences—Limitation of Time for Commencement of Proceedings—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 73, *sub-s.* 8—*Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 11.

By s. 73, sub-s. 8, of the London Building Act, 1894, "No projection from any building" (except certain specified projections) "shall extend beyond the general line of buildings in any street" without the consent of the London County Council. By s. 11 of the Summary Jurisdiction Act, 1848, where no time is specially limited by Act of Parliament for making a complaint or laying an information, the complaint shall be made or the information laid within six months from the time when the matter of such complaint or information arose.

The appellant was convicted on an information charging him with the offence specified in s. 73, sub-s. 8, of the London Building Act, 1894,

LONDON—*continued.*
the projection complained of being a wooden case attached to the external wall of a building by iron brackets, and used as an advertising sign. It had been put up more than six months before the information was laid:—

Held, that the conviction was wrong because, first, the sign was not a projection within the meaning of s. 73, sub-s. 8, which applies only to projections forming part of the building from which they project, and, secondly, the prosecution was barred by s. 11 of the Summary Jurisdiction Act, 1848. HULL *v.* LONDON COUNTY COUNCIL - - - - **Div. Ct. 580**

2. —— *Buildings—Public Building—Hospital —"Public Purpose"—Home for Defective Children —London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 5, *sub-s.* 27.

A house provided by the managers of the Metropolitan Asylums District as a permanent home (but not as a school) for children, who by reason of defect of intellect or physical infirmity cannot be properly trained in association with children in ordinary schools, is not a "public building" within the meaning of the London Building Act, 1894. MOSES *v.* MARSLAND **Div. Ct. 668**

3. —— *Street—New Street—Sewer—Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 52, 53.

An old highway about a thousand yards long formed the boundary between the parish of Clerkenwell, in the county of London, and the parish of Hornsey, in the county of Middlesex, the boundary line running down the centre of the highway. Prior to the coming into operation of the Metropolis Management Act, 1855, houses had been built along the Hornsey side of the highway for nearly its whole length, but on the Clerkenwell side there were only a few scattered buildings. In recent years the frontage on the Clerkenwell side had also been covered with buildings, and in 1898 the Clerkenwell Vestry laid down a sewer under their portion of the highway for the purpose of draining the houses on that side, and apportioned the expenses amongst the frontagers on that side of the highway. Upon the hearing of a summons under s. 52 of the Metropolis Management Act, 1862, against one of the frontagers for recovery of the apportioned amount of the expenses, the justices found that the highway taken as a whole was sufficiently built upon to be a street before the Metropolis Management Act, 1855, came into operation, and held that the Clerkenwell portion of the lane could not be dealt with by itself for the purpose of determining whether it was a new street; they therefore dismissed the summons:—

Held, that, having regard to their finding of fact that the whole highway had become a street in 1855, the justices were right in holding that they were precluded from looking at the Clerkenwell portion as a street by itself, and from determining whether it had become a new street since that date. CLERKENWELL VESTRY *v.* EDMONDSON & SON - - - - **Div. Ct. 264**

4. —— *Streets — Paving Expenses — Open Spaces—"Owner"—Metropolis Management Acts —Land capable of being made a Source of Profit*

LONDON—*continued.*
—18 & 19 *Vict. c.* 120, *s.* 250—25 & 26 *Vict. c.* 102, *s.* 77—40 & 41 *Vict. c.* 35, *s.* 1—44 & 45 *Vict. c.* 34, *s.* 5—56 & 57 *Vict. c. lxxi.*

Land was conveyed to a vestry in fee simple "to the end and intent that the same premises should be at all times thereafter kept and maintained as an open space for the perpetual use thereof by the public for exercise and recreation." The land was an open space abutting on a new street, and was acquired under the powers conferred on the vestry by the Open Spaces Acts, 1877 and 1881, by which the land was held in trust for the perpetual use thereof by the public for exercise and recreation, and for no other purpose.

By the London Open Spaces Act, 1893, the vestry might erect on the land convenient and ornamental buildings, and such appliances as they might think fit for purposes of exercise and recreation, and for other like purposes. They erected a band stand, a cloak-room, and a refreshment stall. The refreshment stall was let at a rent to a caterer. The band stand was not let, but seats for the public were let by the vestry to a contractor at a rental.

The vestry assessed the respondent, as owner of houses on the opposite side of the street, upon the basis that the cost of paving the new street should be defrayed by the owners of the houses and lands on the opposite side of the street, and not in any part by the owners of the land which included the open space.

A summons to recover the amount apportioned on the respondent was dismissed on the ground that the apportionment was invalid, because a part of the cost of paving ought to have been apportioned on the vestry as owners of the open space.

On a case stated:—

Held, that the open space was not land which was incapable of becoming a source of profit, and therefore the vestry were the persons who would receive the rent of the land if the same were let at a rack rent, and were owners of the open space within the definition in the Metropolis Management Act, 1855, s. 250, and were liable as owners to contribute to the cost of paving the new street, and the summons was rightly dismissed. FULHAM VESTRY *v.* MINTER **Div. Ct. 501**

—— Exemption from taxes and assessments—City of London—Consolidated rate **617**
See STATUTE.

—— Poor-rate—Appeal against valuation list—Recovery of rates paid pending appeal
See RATES. 2. **650**

MACHINERY—Used in loading from a quay—Occupier—Person using machinery—"Undertaker" - - - - **20**
See EMPLOYER AND WORKMAN. 7.

MARINE INSURANCE—General average—Assured owner both of ship and cargo—Liability of underwriters - - **147**
See INSURANCE, MARINE.

MARRIED WOMAN.
See HUSBAND AND WIFE.

MARRIED WOMAN—*continued.*

—— "Carrying on" business separately from husband — "Absenting" — Receiving order - - - - - 309
See BANKRUPTCY. 2.

MASTER AND SERVANT—*False Imprisonment —Evidence of Implied Authority—Manager of Public-house.*

The plaintiff was head barman and cellarman in a public-house of which the defendant was owner; the defendant took no part in the management of the house, though he visited it nearly every day, the manager on behalf of the defendant being one M., who had the general management of the house. While the plaintiff was superintending the operation of bringing mineral waters into the cellar, the manager, acting under the mistaken impression that whisky was being removed from the cellar, sent for a policeman and gave the plaintiff into custody on a charge of stealing whisky. Before reaching the police station the manager admitted that he had made a mistake, and on arrival at the police station the plaintiff was released by the inspector. In an action for false imprisonment:—

Held, that there was no evidence that the manager had an implied authority from the defendant to give the plaintiff into custody, the act not being reasonably necessary for the protection of his master's property, and that the defendant was therefore not liable. HANSON *v.* WALLER - - - - Div. Ct. 390

—— Workmen's Compensation Act.
See Cases under EMPLOYER AND WORKMAN.

MAXIMS OF LAW—"Quæ ipso usu consumuntur"—Farming stock—Gift for life
See WILL. 360

MERCHANDISE MARKS—"Trade description" —Unintelligible writing explained by oral statement - - - 1
See TRADE-MARK.

METROPOLIS.
See LONDON.

MINES—*Abandonment—Notice to Secretary of State—Neglect to send—Offence against Act—Limitation of Time—Coal Mines Regulation Acts*, 1887, 1896 (50 & 51 *Vict. c.* 58, *s.* 38, *sub-s.* 5; 59 & 60 *Vict. c.* 43, *s.* 4).

The respondent was charged, as owner of a mine, with failing to comply with the Coal Mines Regulation Act, 1887, s. 38, as amended by the Coal Mines Regulation Act, 1896, s. 4, in not sending to a Secretary of State, within three months after abandonment of a seam in the mine, a plan, as prescribed by the Acts.

By s. 38, sub-s. 5, the information may be laid at any time within six months after abandonment, or after service on the owner of a notice to comply with the requirements of the section, whichever last happens.

On January 25, 1900, after the abandonment, the appellant wrote to the respondent: "I beg to point out to you that no plan of the abandoned workings in the seven-feet coal seam has yet been forwarded, as required by s. 38 of the Mines Act. Will you please give the matter your early attention."

On May 25 the appellant again wrote, requiring the respondent to comply with the Act.

The information was laid on July 27, 1900.

The justices dismissed the information.

On a case stated:—

Held, that s. 38, sub-s. 5, was a clause of limitation, that the letter of January 25 was a good notice, and that, six months after service of the notice having expired before proceedings were taken, the information was out of time, and the decision of the justices was right. STOKES *v.* HILL - - - - - Div. Ct. 493

2. —— *Gravel and Sand—Mines and Minerals —Quarries Act*, 1894 (57 & 58 *Vict. c.* 42), *s.* 1—*Regulation of Railways Act*, 1871 (34 & 35 *Vict. c.* 78), *s.* 6.

Gravel and sand are minerals within the meaning of s. 1 of the Quarries Act, 1894.

The digging of ballast by a railway company upon its own land for the purposes of the railway is not an act done "in the course of working the railway" within the meaning of s. 6 of the Regulation of Railways Act, 1871. SCOTT *v.* MIDLAND RAILWAY COMPANY - - - Div. Ct. 317

—— Mine-owner, Liability of — Contractor — Contract by workman with mine-owner to obey regulations - - 756
See EMPLOYER AND WORKMAN. 11.

—— Stamp — "Conveyance on sale" — Sale, What amounts to—Minerals under railway - - - - - 416
See REVENUE. 6.

—— Statutory rules and orders—Validity—Condition precedent - - - 673
See STATUTORY RULES AND ORDERS.

MISAPPROPRIATION—Fraudulent, by agent— "Banker, merchant, broker, attorney, or other agent" - - - 472
See CRIMINAL LAW. 1.

MISCONDUCT — Solicitors — Administration actions—Agreement to share profit costs between solicitors who represent different conflicting interests - - 187
See SOLICITOR.

MISFEASANCE—Highway—Removal of protecting fence—Misfeasance — Liability of highway authority - - 45
See HIGHWAY. 1.

MISTAKE—Bill of lading—Description of goods
See SHIPPING. 548

MORTGAGE—Estate duty—Interest in expectancy—Incumbrances created by reversioner—Deductions - - 297
See REVENUE. 1.

—— Fixtures — "Dog grates" substituted for fixed gates—Intention to improve inheritance - - - - 205
See FIXTURES.

MUNICIPAL CORPORATION—Election—Town councillor—Disqualification - 683
See CORPORATION.

NAME—Trade union—Right to sue or be sued in registered name - - - 170
See TRADE UNION.

NATIONAL SCHOOL—Income of endowments—Transfer to school board—Action by transferee—Certificate of Charity Commissioners - - - - - 430
See CHARITY.

NEGLIGENCE—Architect's certificate—Architect in position of arbitrator - 624
See BUILDING CONTRACT. 1.

—— Disrepair—Liability of local authority for accident arising from - - 590
See SEWERS.

"NOTICE"—Act of bankruptcy—Suspension of payment—Verbal admission of insolvency—Future partnership - 51
See BANKRUPTCY. 3.

—— Life insurance—Transfer—Collecting societies and industrial assurance companies - - - - 528
See INSURANCE, LIFE.

"OFFICER" OF COMPANY—Presentation of bankruptcy petition - - 476
See BANKRUPTCY. 8.

OPEN SPACES—Streets—Paving expenses—"Owner" - - - - 501
See LONDON. 4.

ORDERS—Rules and—Validity—Condition precedent - - - - 673
See STATUTORY RULES AND ORDERS.

PARLIAMENT—*Franchise—Right of Freeholders of Haverfordwest to Vote for Borough of Pembroke—Registration—Reform Act*, 1832 (2 & 3 *Will.* 4, *c.* 45), *s.* 2, *Sched. E—Redistribution of Seats Act*, 1885 (48 & 49 *Vict. c.* 23), *ss.* 2, 7, 11, *Scheds. I. and V.*

By the Redistribution of Seats Act, 1885, a new parliamentary borough of P. and H. was created, consisting of the parliamentary borough of P. and the places comprised in the area of the parliamentary borough of H., and by the same Act the borough of H., which was a county of itself, ceased to return any member:—

Held, that the freeholders of the old borough of H., who had had as such a right to vote for that borough, had no right as freeholders to vote for the new borough of P. and H. JAMES *v.* IVEMEY - - - - Div. Ct. 193

PARTNERSHIP—*Contract with Partnership—Death of Partner—When Contract terminated by.*

A partnership, consisting of the defendants and another person, carried on the business of music-hall proprietors under the name of the A. Company. The plaintiffs, a troupe of music-hall performers, entered into a contract with the A. Company to give certain performances at the company's music hall. The plaintiffs had no knowledge of the persons of whom the company consisted. After the making of the contract and before the time for performance arrived the defendants' partner died:—

Held, that the contract was not of such a personal character on the part of the partnership as to be put an end to by the death of the deceased partner, and that it could be enforced against the defendants, the surviving partners. PHILLIPS *v.* ALHAMBRA PALACE COMPANY - Div. Ct. 59

—— Gambling partnership—Agreement by way of gaming or wagering—Bets paid by one partner—Claim for contribution 11
See GAMING. 2.

—— Loan by one partner to another, Recovery of—Act of bankruptcy—Debt—Future partnership - - - - 51
See BANKRUPTCY. 3.

—— Practice—Affidavit for leave to issue judgment summons against partner - 532
See COUNTY COURT. 2.

PAUPER—Formâ pauperis, Plaintiff suing in——Solicitor, Assignment of—Official solicitor - - - - 596
See PRACTICE. 3.

—— Settlement—Divided parishes - 720
See POOR LAW. 1.

PAVING—Expenses—Streets—Open spaces—"Owner" - - - - 501
See LONDON. 4.

PENSION—Special-duty allowance—"Annual pay" - - - - 384
See POLICE.

PETITION—Bankruptcy - - - 476
See BANKRUPTCY. 8.

PHARMACY—Sale of food and drugs—Standard strength of drugs—British Pharmacopœia - - - - 437
See ADULTERATION.

PHARMACY ACTS—*Sale of Poisons—Order taken by Canvassing Agent—"Seller"—Pharmacy Act*, 1868 (31 & 32 *Vict. c.* 121), *s.* 15.

The defendant, a seedsman and florist at Worcester, acted as agent to receive orders for a limited company at Liverpool, who were the manufacturers of a preparation called "Weed Killer," which contained arsenic. The defendant took at his shop, for transmission to the company, an order for "Weed Killer," and received on account of the company the price of the quantity ordered, for which he gave a receipt on a bill headed with the name of the company. He subsequently transmitted the order to the company, who sent the "Weed Killer" ordered to the giver of the order direct. The defendant was in the habit of taking, and dealing with, orders for "Weed Killer" in the manner above described, and he received a commission from the company in respect of orders so transmitted by him and executed by the company. In an action in the county court against the defendant for a penalty for selling poison in contravention of the Pharmacy Act, 1868, s. 15, the county court judge gave judgment for the defendant, on the ground that the defendant was not the seller of the "Weed Killer" within the meaning of the section, and he found as a fact that the defendant was in the position merely of a canvasser for the company, with authority to receive money on their account. On appeal against his decision:—

Held (affirming the judgment of a Divisional

PHARMACY ACTS —*continued.*
Court, [1900] 1 Q. B. 454), that, there being evidence to support the county court judge's finding of fact, the Court was bound thereby, and that, upon that finding, the defendant did not sell the "Weed Killer" within the meaning of s. 15 of the Pharmacy Act, 1868. PHARMACEUTICAL SOCIETY *v.* WHITE - - - C. A. 601

POISON—Sale of—Order taken by canvassing agent—"Seller" - - - 601
See PHARMACY ACTS.

POLICE — *Pension — Special-duty Allowance — "Annual Pay"—Police Act*, 1890 (53 *&* 54 *Vict. c.* 45), *Sched. I., Rules* 1, 11.

By the Police Act, 1890, a constable who has completed a certain number of years' approved service is entitled to a pension, which is to be calculated on the amount of his "annual pay" at the date of his retirement.

A constable was appointed by the commissioners of police to attend permanently on special duty at the House of Lords. For that special duty, which he discharged for several years up to the time of his retirement, he received the sum of 1*s.* a day in addition to his ordinary pay:—

Held, that the extra remuneration for the special duty formed no part of his "pay" for the purposes of the calculation of his pension.

Judgment of the Queen's Bench Division, [1900] 1 Q. B. 680, affirmed. UPPERTON *v.* RIDLEY - - - - C. A. 384

POLICY—Life insurance—Estate duty—Settled property - - - - 285
See REVENUE. 2.

POOR LAW—*Settlement—Alteration of Area of Parish in which Settlement acquired—Pauper—Divided Parishes and Poor Law Amendment Act*, 1876 (39 *&* 40 *Vict. c.* 61)—*Poor Law Act*, 1879 (42 *&* 43 *Vict. c.* 54).

By an order of the Local Government Board made under the provisions of the Divided Parishes and Poor Law Amendment Act, 1876, as amended and extended by the Poor Law Act, 1879, a portion of a parish was added to and amalgamated with another parish in which a pauper had previously acquired a settlement:—

Held, that the order did not operate to destroy the parish to which the portion was added, and that the settlement of the pauper remained unaffected. WEST HAM UNION *v.* LONDON COUNTY COUNCIL - - Div. Ct. 720

2. —— *Union, Alteration of—Apportionment of Property—Annual Sums payable to Union—Poor Law Amendment Act*, 1834 (4 *&* 5 *Will.* 4, *c.* 76), *s.* 32.

Where, on the separation of a parish from a union of which it previously formed part under the Poor Law Amendment Act, 1834, s. 32, the Local Government Board, by an order intended to be made under that section, directed that sums payable annually by the county council to the union under the Local Government Act, 1888, s. 24, sub-s. 2 (*d*), and s. 26, sub-s. 1, should be apportioned between the union and the parish in each year according to their respective rateable values for the time being:—

Held, that the Local Government Board had

POOR LAW—*continued.*
no power to make such an order, inasmuch as s. 32 of the Poor Law Amendment Act, 1834, contemplates a final settlement between the two bodies based on an estimate of the existing proportionate values of their respective interests in the property to be apportioned. THE QUEEN *v.* LOCAL GOVERNMENT BOARD - - C. A. 210

POOR-RATE—Rateability—Underground sewers —Diminution in value of surface 406
See RATES. 3.

PRACTICE—*Appeal—Commercial List.*

An appeal will lie to the Court of Appeal against an order for entry of a cause in the commercial list if it be not a commercial cause. SEA INSURANCE COMPANY *v.* CARR - - C. A. 7

2. —— *Costs—Sum less than* 10*l. recovered in Action founded on Tort—Action "which could have been commenced in a County Court"—County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 116.

An action is one which "could have been commenced in a county court" within the meaning of the County Courts Act, 1888, s. 116, if it is an action of a kind which a county court can entertain, although the amount claimed by the plaintiff may exceed the limit of the county court jurisdiction.

Goldhill v. *Clarke*, (1893) 68 L. T. 414, disapproved of.

Lovejoy v. *Cole*, [1894] 2 Q. B. 861, followed. SOLOMON *v.* MULLINER - - - C. A. 76

3. —— *Formâ Pauperis, Plaintiffs suing in—Solicitor, Assignment of — Official Solicitor — Order* XVI., *r.* 26.

Except under very special circumstances the official solicitor ought not to be assigned to assist a pauper litigant under Order XVI., r. 26. MOUTRIE *v.* MITCHELL - - - C. A. 596

4. —— *Judgment — Amendment — Error arising from Accidental Slip or Omission—Item omitted from Bill of Costs—Order* XXVIII., *r.* 11.

In an action in the High Court the plaintiffs recovered judgment for an amount to be ascertained by a referee and costs. The referee made his award, and the plaintiffs took it up and paid the amount of his fees. Judgment was drawn up and entered for the plaintiffs for the amount found to be due by the referee, with costs to be taxed. The costs were taxed, and the taxing master's certificate was given, and the defendant paid to the plaintiffs the amount of the judgment and the taxed costs. Subsequently the plaintiffs discovered that the amount of the fees of the referee had been omitted from the bill of costs carried in for taxation. On an application that the defendant should be ordered to pay the amount of those fees, or such part thereof as should be allowed on taxation:—

Held, that there had been an error in the judgment arising from an "accidental slip or omission," which could be corrected under Order XXVIII., r. 11, by including therein the amount allowed on taxation in respect of the fees paid to the referee. CHESSUM & SONS *v.* GORDON - - - - - C. A. 694

—— Arbitrator functus officio—Power to remit matters referred - - - 105
See ARBITRATION.

PRACTICE—*continued.*

—— County court — Garnishee summons — Attachment of debt—Balance in hands of garnishee - - - 102
See COUNTY COURT. 3.

—— Workmen's compensation—County court.
See Cases under EMPLOYER AND WORKMAN.

PREFERENCE — Fraudulent — Breach of trust —Voluntary restitution on eve of bankruptcy - - - - 710
See BANKRUPTCY. 6.

PRESUMPTION—Highway—New or substituted highway—Formalities—Lapse of time
See HIGHWAY. 2. 747

PRIORITY — Debentures, Contract to issue — Charge—Execution creditor - 771
See COMPANY. 1.

PROFIT COSTS—Agreement to share, between solicitors who represent different conflicting interests — Misconduct—Administration actions - - - 187
See SOLICITOR.

PROHIBITION—Jurisdiction — Affidavit, Form of—Insufficiency of affidavit - 487
See COUNTY COURT. 1.

PROJECTION—In street — Advertisement sign attached to building—Offences—Limitation of time - - - 580
See LONDON. 1.

PROOF—Appeal by debtor against admission of proof—Conditional withdrawal of proof refused - - - - 655
See BANKRUPTCY. 10.

—— Debt—Money lent by wife to husband — Onus of proving whether lent for purpose of husband's business - - 480
See BANKRUPTCY. 9.

PUBLIC BUILDING — Hospital — "Public purpose" - - - - 668
See LONDON. 2.

PUBLIC HEALTH — Sanitary conveniences — Power of factory inspector to make requirement - - - 444
See FACTORY ACTS. 1.

PUBLIC-HOUSE—Manager of—Evidence of implied authority—False imprisonment
See MASTER AND SERVANT. 390

QUARRIES—Mines and minerals—Gravel and sand—Regulation of railways - 317
See MINES. 2.

QUARTER SESSIONS—Appeal to, from requirement of factory inspector — Sanitary conveniences - - - 444
See FACTORY ACTS. 1.

QUAY—Workmen's compensation—"Factory"—Quay, Ship alongside of — "Undertakers" - - - - 35
See EMPLOYER AND WORKMAN. 5.

—— Workmen's compensation—Machinery used in loading from a quay — Occupier—Person using machinery - - 20
See EMPLOYER AND WORKMAN. 7

RAILWAY—Mines and minerals—Gravel and sand—Quarries—Regulation of railways
See MINES. 2. 317

—— Stamp—"Conveyance on sale"—Sale, what amounts to—Minerals under railway
See REVENUE. 6. 416

—— Stamp duty—Increase of nominal capital
See REVENUE. 8. 220

RATES — *Gravel Pits — Exhaustion of Subject-matter of Assessment—Value of Occupation when Rate made—Land—Poor-rate.*

A company purchased of the owner of a bed of gravel the gravel in three separate plots of land, with the right to dig and remove it. A time was fixed in each case in which the gravel might be taken out, and the company were bound to level the ground and replace the top soil, and to give the owner possession at the date named. The company were assessed in one assessment in respect of their occupation of the three plots, and a rate was subsequently made on the basis of this assessment. When this rate was made the company were still in occupation of the three plots, and were at work on the gravel in one of them, but all the gravel in the other two plots had been taken out, and they were only used as storage ground for gravel dug by the company. On a case stated at quarter sessions:—

Held, that the company were rateable on the value, at the time of making the rate, of the land in their occupation, and that the annual value ought to be taken at the amount of rent or royalty at which the same could then be reasonably expected to be let to a tenant from year to year, regard being had to the value of the gravel in the unexhausted plot, added to the value of the exhausted plots for storage purposes. FARNHAM FLINT, GRAVEL AND SAND COMPANY *v.* FARNHAM UNION - - - - - C. A. 272

2. —— *Practice—Appeal against Valuation List—Removal of Appellant's Name from List—Alteration of Assessment—Recovery of Rates paid pending Appeal — Poor-rate—Procedure—Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *s.* 44.

By s. 44 of the Valuation (Metropolis) Act, 1869, where in consequence of the decision on any appeal under the Act to assessment sessions or a superior Court an alteration in the valuation list is made which alters the amount of the assessment, contribution, rate, or tax levied thereunder, the difference, if too much has been paid, is to be repaid or allowed.

Upon a case stated by quarter sessions on an appeal by the plaintiff against a valuation list, the Court held that the plaintiff was not the rateable occupier of the premises, and was not liable to be rated in respect thereof. The vestry performing the duties of overseers having refused to repay to the plaintiff the amount of certain rates levied by them under the valuation list, and paid by him during the pendency of the appeal proceedings, the plaintiff brought an action against them to recover the sums so paid:—

Held, that, although the effect of the appeal had been to strike the plaintiff's name altogether out of the valuation list, there had nevertheless

RATES—*continued.*

been an alteration in the valuation list which altered the amount of the assessment, contribution, rate, or tax levied thereunder within the meaning of the section, and that the plaintiff was entitled to recover. BURTON *v.* BLOOMSBURY VESTRY - - - **Mathew J. 650**

3. —— *Sewers—Underground Sewers—Sewer covered by Embankment—Payments Received for Use of Sewer—Diminution in Value of Surface—Poor-rate.*

The exemption of underground sewers from liability to poor-rate is anomalous, and will not be extended. Therefore, in order that a new sewer which is primâ facie rateable may escape from such liability, it must fall strictly within the limits of the authorities by which the exemption was established—that is to say, it must not occupy or affect the surface, and no payment must be made to its owners for the use of it by others.

A sewer authority constructed a sewer for the purpose of conveying the sewage of their district to the sea. Part of this sewer was carried on concrete arches above the surface of the ground, part of it was below the natural surface of the ground, and the rest of it was covered by an embankment. The land upon which the embankment was constructed continued to be assessed for the purposes of the poor-rate as before, no change in the assessment of it having been made by reason of the making of the embankment. The sewer authority received payments annually from other authorities for the use by them of the sewer:—

Held, that the sewer, including the portions of it covered by the embankment and underground, was rateable to the poor-rate.

West Ham v. *London County Council*, [1893] A. C. 562, discussed.

Judgment of the Divisional Court, [1900] 1 Q. B. 365, affirmed. YSTRADYFODWG AND PONTYPRIDD MAIN SEWERAGE BOARD *v.* NEWPORT ASSESSMENT COMMITTEE - - **C. A. 406**

—— Exemption from taxes and assessments—City of London—Consolidated rate **617**
See STATUTE.

—— School board—Science and art schools or classes—Power to provide out of rates
See SCHOOLS. **322**

RECEIVING ORDER — Married woman — "Carrying on" business separately from husband—"Absenting"—Act of bankruptcy - - - - **309**
See BANKRUPTCY. 2.

—— Proof—Appeal by debtor against admission of—Conditional withdrawal of proof refused - - - - **655**
See BANKRUPTCY. 10.

REDISTRIBUTION OF SEATS — Franchise — Registration - - - **193**
See PARLIAMENT.

REFORM ACT—Franchise—Registration - **193**
See PARLIAMENT.

REGISTRATION — Assignment for benefit of creditors — Deed executed abroad — Title to goods in England - **536**
See CONFLICT OF LAWS.

REGISTRATION OF VOTERS—Franchise **193**
See PARLIAMENT.

REMUNERATION—Director—Yearly payment
See COMPANY. 2. **613**

REPAIR—Disrepair—Liability of local authority for accident arising from—Negligence
See SEWERS. **590**

REVENUE—*Estate Duty—Expectancy, Interest in — Incumbrances created by Reversioner — Deductions—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 21, *sub-s.* 3.

By the Finance Act, 1894, s. 21, sub-s. 3, "Where an interest in expectancy in any property has, before the commencement of this part of this Act, been bonâ fide sold or mortgaged for full consideration in money or money's worth, then no other duty on such property shall be payable by the purchaser or mortgagee when the interest falls into possession, than would have been payable if this Act had not passed; and in the case of a mortgage, any higher duty payable by the mortgagor shall rank as a charge subsequent to that of the mortgagee."

A tenant in tail in remainder to freehold estates raised money during the lifetime of the tenant for life (*a*) by granting annuities or rent-charges charged upon the property, (*b*) by purchasing an annuity and charging his interest in expectancy with the capitalized value, and (*c*) by a mortgage of his interest in expectancy:—

Held, that the annuities granted by the reversioner were in the nature of mortgages and not of sales for a valuable consideration; that the exemption in s. 21, sub-s. 3, of the Finance Act, 1894, was an exemption in favour of a purchaser or mortgagee, and not of a vendor or mortgagor, and that the reversioner was not entitled under s. 21, sub-s. 3, on the death of the tenant for life to exemption from estate duty in respect of any of the incumbrances created by him. *In re* VERNON - - **Div. Ct. 297**

2. —— *Estate Duty—Insurance — Policy of Life Insurance—Settled Property—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 3.

By s. 1 of the Finance Act, 1894, estate duty is granted upon all property which passes on the death of a person dying after the commencement of the Act. By s. 2, "property passing on the death" is to be deemed to include (sub-s. 1 (*d*)) any annuity or other interest purchased or provided by the deceased to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death. Sect. 3 exempts from estate duty property passing on the death of the deceased by reason only of a bonâ fide purchase from the person under whose disposition the property passes, where such purchase was made for full consideration in money or money's worth paid to the vendor for his own use or benefit.

A tenant for life of freehold estates, being in pecuniary difficulties, entered into an arrangement with his son, the tenant in tail in remainder, by which the entail was barred, and the fee was then mortgaged to secure advances to the father. The father was also possessed of policies on his own life to an amount substantially equivalent to the amount of the

REVENUE—*continued.*

mortgage debt, which policies were, pursuant to the arrangement, assigned to trustees, who were to receive all policy moneys (if any) that might become payable during the life of the father and apply them in reduction of the mortgage debt, and subject thereto were to hold all policy moneys and accumulations in trust for the son. The father's life interest was assigned to the trustees, who were out of the income to pay the mortgage interest and the premiums on the policies and other specified outgoings, and to divide the surplus income up to a certain amount between father and son and create a sinking fund out of the ultimate surplus. On the father's death the trustees received the policy moneys and paid them over to the son:—

Held, that the sums payable under the policies were an "interest purchased or provided by the deceased" within the meaning of s. 2, sub-s. 1 (*d*); that the arrangement did not amount to an assignment of the policies to the son, but was an arrangement by virtue of which an interest in the policies passed to the son on the father's death; that the transaction was in the nature of a family arrangement and not a purchase by the son, and that therefore the exemption from estate duty contained in s. 3 did not apply. ATTORNEY-GENERAL *v.* HAWKINS **Div. Ct. 285**

3. —— *Estate Duty—Property passing on Death—Devise to Issue of Testator—Death of Devisee in Lifetime of Testator—Issue of Devisee living at Death of Testator—Devise taking effect as if Devisee had survived Testator—Wills Act*, 1837 (7 *Will.* 4 *and* 1 *Vict. c.* 26), *s.* 33—*Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-s.* 1 (*a*); *s.* 22, *sub-s.* 1 (*l*), *sub-s.* 2 (*a*).

A father devised real property to his son, who died in the lifetime of the father, leaving a daughter, who was living at the death of the father. The son devised his residuary real estate to trustees. This devise included the property devised by the father's will, and took effect with regard to it by virtue of the Wills Act, 1837, s. 33. On the death of the father estate duty was paid on all the property which passed on his death, including the property devised to his son. The Commissioners of Inland Revenue claimed in addition estate duty on the last-mentioned property as property passing on the death of the son within the meaning of the Finance Act, 1894.

On appeal by the trustees against the claim of the Commissioners under s. 10 of the Finance Act, 1894:—

Held (affirming the judgment of Darling and Channell JJ., [1900] 1 Q. B. 372), that the duty so claimed was payable by the trustees. *In re* SCOTT - - - - - **C. A. 228**

4. —— *Estate Duty—Succession Duty—Disposition by Foreigner domiciled Abroad—Property situate Abroad—Disposition to English Company on Trusts enforceable by English Law—Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2—*Succession Duty Act*, 1853 (16 *&* 17 *Vict. c.* 51), *ss.* 2, 7, 8, 16.

In 1892 a foreigner domiciled in Austria gave by a deed in the English language and form to an English company, constituted under the Companies Act, and having its registered office in London, certain stocks, shares, and securities to a large amount upon the terms and conditions that the company would permit the donor to receive the income thereof during his life, and, after his death, would apply the same, and any investments substituted for them under the powers of the deed, for the benefit of Russian Jews generally, and principally for the promotion of the emigration of Russian Jews from Europe, and of their settlement in various countries outside Europe. The company had been formed to carry out the same objects, and at the time of the execution of the deed the various securities comprised therein were transferred to the company by the donor. The whole of the company's business was, under the articles of association, transacted by a council which sat at the principal office of the company in Paris. The ordinary and extraordinary general meetings of the company were held at their registered office in London, but formal business only was transacted there. In 1896 the donor, who was still domiciled in Austria, died. At that time the principal part of the securities subject to the deed were foreign securities situate abroad, and the documents of title thereto were abroad, a small proportion only of the property subject to the deed being in England:—

Held (affirming the judgment of Ridley and Darling JJ., [1900] 2 Q. B. 556), that there was on the death of the donor a succession by the company within the meaning of s. 2 of the Succession Duty Act, 1853, and that therefore succession duty under that Act, and, consequently, estate duty under the Finance Act, 1894, were payable upon the principal value of all the property which was subject to the trusts of the deed of 1892 at the donor's death. ATTORNEY-GENERAL *v.* JEWISH COLONIZATION ASSOCIATION **C. A. 123**

5. —— *Income Tax — Company — Profits or Gains—Interest from Foreign Investments—Receipt in the United Kingdom—Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 100, *Sched. D, Fourth Case—Income Tax Act*, 1853 (16 *&* 17 *Vict. c.* 34), *s.* 2, *Sched. D.*

An insurance society carried on their business in the United Kingdom, and, by means of local agents or managers, in foreign countries. The business was entire and indivisible, and was managed by a board of directors in London. The society possessed funds invested in foreign countries in which they did no business. The interest on these investments was either reinvested in those countries, remitted directly to other foreign countries for investment, or remitted to London. They also possessed funds invested in foreign countries in which they carried on business. The interest on these investments was either reinvested in those countries, applied in establishment and other charges in those countries, remitted direct to other foreign countries for investment or for the general purposes of the society, or remitted to London. Yearly accounts were prepared in which all the interest on investments in foreign countries was included, and out of the profits shewn by the accounts a dividend was paid yearly to the shareholders. The surplus funds of the society divisible as profits

REVENUE—*continued.*

were ascertained by actuarial valuation once in three years, and all the interest on investments in foreign countries was included in the triennial account:—

Held, that all the interest on foreign investments was received in the United Kingdom within the meaning of the fourth case of s. 100 of 5 & 6 Vict. c. 35, and was liable to income tax under Sched. D. GRESHAM LIFE ASSURANCE SOCIETY, LIMITED *v.* BISHOP - - C. A. 153

6. —— *Stamp*—"*Conveyance on Sale*"—*Sale, what amounts to*—*Minerals under Railway*—*Statutory Obligation not to Work*—*Receipt for Compensation*—*Undertaking by Mine Owner not to Work*—"*Right not before in existence*"—*Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 60, *Sched. I.*—*Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 78, 79.

A colliery company, who were the owners of coal under and adjacent to a railway, gave notice to the railway company under s. 78 of the Railways Clauses Consolidation Act, 1845, of their intention to work the coal. The railway company thereupon gave notice to the colliery company under the section that they were willing to make compensation for the coal. The amount of the compensation having been fixed by arbitration, the railway company paid that amount, and the colliery company executed an instrument under seal by which they acknowledged receipt of the amount in satisfaction of all claims by them in respect of the coal, and undertook to leave the coal unworked:—

Held, that the instrument so executed was not chargeable with the ad valorem stamp duty payable upon a "conveyance on sale" under the Stamp Act, 1891.

By A. L. Smith M.R., Collins L.J., and Stirling L.J.: The right of the railway company to have the coal left unworked came into existence when the notices were given under s. 78 of the Railways Clauses Consolidation Act, 1845, and therefore that right was not a "right not before in existence" within the meaning of s. 60 of the Stamp Act, 1891, at the date of the instrument.

By Collins L.J. and Stirling L.J.: The transaction between the colliery company and the railway company was not a "sale" of property or any interest in property within the meaning of the Stamp Act, 1891.

Judgment of the Divisional Court, [1899] 2 Q. B. 652, affirmed. GREAT NORTHERN RAILWAY COMPANY *v.* INLAND REVENUE COMMISSIONERS C. A. 416

7. —— *Stamp Duty*—"*Property*," *Interest in*—*Sale of Benefit of Contract*—*Agreement with regard to Land situate out of United Kingdom*—*Property not situate out of United Kingdom*—*Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 59, *sub-s.* 1.

By a contract dated January 25, 1899, a foreigner resident in Roumania undertook to transfer to F. or his nominees a certain quantity of land, suitable for the erection of a sugar factory, to be situated in a certain locality in Roumania, but the exact situation of which was to be selected by F. or his nominees; he further undertook to procure a certain quantity of land

REVENUE—*continued.*

in the same locality, and to cultivate thereon in a certain manner beetroot, which he was to supply for the purposes of the sugar factory at fixed prices.

By an agreement under seal dated April 14, 1899, made in England, the benefit of the contract of January 25, 1899, was sold to an English company:—

Held, that the benefit of the contract of January 25, 1899, was "property" within the meaning of s. 59, sub-s. 1, of the Stamp Act, 1891, and that it was not within the exception therein contained as being "property locally situate out of the United Kingdom"; and that an ad valorem duty was therefore payable on the agreement of April 14, 1899. DANUBIAN SUGAR FACTORIES, LIMITED *v.* INLAND REVENUE COMMISSIONERS C. A. 245

8. —— *Stamp Duty*—*Railway Company*—*Increase of Nominal Capital*—*Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 113.

Under the provisions of a special Act passed for the purpose of rearranging and consolidating the stocks of a railway company, the following changes (inter alia) were effected.

The then existing 4 per cent. preference stock of the company was cancelled, and there was created in lieu thereof a 2½ per cent. preference stock, of which the total nominal amount and the proportion allotted to each stockholder were such as to make the amounts payable by way of dividends the same as on the old stock. The then existing ordinary stock of the company was cancelled, and there was created in lieu thereof a new ordinary stock of twice the nominal value of the old stock, one-half being preferred ordinary stock, entitled to a dividend at the rate of 2½ per cent. per annum, and the other half being deferred ordinary stock. There was allotted to each holder of the old ordinary stock as much of each kind of the new ordinary stock as the amount which he held of the old ordinary stock:—

Held (affirming the judgment of Ridley and Darling JJ., [1900] 2 Q. B. 353), that the increase so authorized by the Act of the nominal amount of the share capital of the company was "an increase of the amount of nominal share capital" within the meaning of s. 113 of the Stamp Act, 1891, and that the stamp duty imposed by that section was payable in respect of it. ATTORNEY-GENERAL *v.* MIDLAND RAILWAY COMPANY - - - - C. A. 220

RULES AND ORDERS—Validity—Condition precedent - - - - 673
See STATUTORY RULES AND ORDERS.

RULES OF SUPREME COURT—Order XVI., r. 26—*Parties* - - - - 596
See PRACTICE. 3.

—— Order XVII., r. 4—*Change of Parties by Death, &c.* - - - - 260
See BANKRUPTCY. 1.

—— Order XXVIII., r. 11—*Amendment* - 694
See PRACTICE. 4.

—— Order XLII., r. 23—*Execution* - 260
See BANKRUPTCY. 1.

SALE—Foods and drugs—Standard strength of drugs - - - - - 437
See ADULTERATION.

—— Poisons—Order taken by canvassing agent—"Seller" - - - - 601
See PHARMACY ACTS.

—— What amounts to—Stamp—"Conveyance on sale"—Minerals under railway 416
See REVENUE. 6.

SALE OF GOODS—*Contract—Goods not accordiny to Specification — Right to Reject — Stipulation against Rejection.*

A contract for the sale of laths to be shipped, and to be "about the specification stated below," provided that the property in the goods was to be deemed to have passed to the buyers when the goods were put on board, and contained a clause that, if any dispute arose under the stipulations of the contract, the buyers were not to reject any of the goods, but the dispute was to be referred to arbitration. The sellers having put on board laths which were not of the specified lengths:—

Held, that the buyers were justified in rejecting these laths on their arrival in this country, and were not bound by the terms of the contract to accept them subject to an allowance to be fixed by arbitration. VIGERS BROTHERS *v.* SANDERSON BROTHERS - - - **Bigham J. 608**

2. —— *Passing of Property under unenforceable Contract—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 4, *sub-s.* 1.

Semble, the fact that a contract for the sale of goods does not comply with the requirements of s. 4 of the Sale of Goods Act, 1893, though it renders the contract not enforceable by action, does not make it void, and does not prevent the property in the goods from passing under it to the purchaser.

Nicholson v. *Bower*, (1858) 1 E. & E. 172, discussed. TAYLOR *v.* GREAT EASTERN RAILWAY COMPANY - - - - **Bigham J. 774**

SAND—Gravel—Mines and Minerals—Quarries—Regulation of railways - 317
See MINES. 2.

SANITARY CONVENIENCES—Power of factory inspector to make requirement - 444
See FACTORY ACTS. 1.

SAVINGS BANK—Refusal to order payment by insurers into—Workmen's compensation—Appeal - - - - - 707
See EMPLOYER AND WORKMAN. 10.

SCAFFOLDING — Workmen's compensation — Structure of trestles and boards within building—Whether scaffolding question of fact for arbitrator - - - 25
See EMPLOYER AND WORKMAN. 9.

SCHOOL BOARD—Money raised by rate—Limitation to payment for elementary education - - - - - 726
See SCHOOLS.

SCHOOLS—*School Board—Provision of Science and Art Schools and Classes—Money raised by Rate—Limitation to Payment for Elementary Education — Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75)—*Elementary Education Acts*, 1870 *to* 1891—*Technical Instruction Acts*, 1889 *and* 1891 (52 & 53 *Vict. c.* 76; 54 & 55 *Vict. c.* 4) —*Education Code* (1890) *Act*, 1890 (53 & 54 *Vict. c.* 22).

It is not within the power of a school board to expend money raised by local rate upon any education other than elementary.

Decision of the Queen's Bench Division, [1901] 1 Q. B. 322, affirmed. THE QUEEN *v.* COCKERTON **C. A. 726**

—— National school—Income of endowments—Transfer to school board—Action by transferee—Certificate of Charity Commissioners - - - - 430
See CHARITY.

SCIENCE AND ART SCHOOLS—School board
See SCHOOLS. **726**

SECRETARY OF STATE—Order of—Validity—Condition precedent—Notice of making of order - - - - 673
See STATUTORY RULES AND ORDERS.

SECURED CREDITOR—Proof, Appeal by debtor against admission of—Conditional withdrawal of proof refused - - 655
See BANKRUPTCY. 10.

SENTENCE— Practice—Hard labour—Common law forgery - - - - 740
See CRIMINAL LAW. 2.

SERVANT—False imprisonment — Evidence of implied authority—Manager of public-house - - - - 390
See MASTER AND SERVANT.

—— Workmen's Compensation Act.
See Cases under EMPLOYER AND WORKMAN.

SETTLEMENT—Pauper - - - 720
See POOR LAW. 1.

SEWERS—*Disrepair—Liability of Local Authority for Accident arising from—Negligence.*

A local sanitary authority, in whom a sewer under a highway is vested by the Public Health Act, 1875, is not in the absence of negligence liable for an accident caused to a person passing along the highway, by reason of the sewer having got out of repair.

Borough of Bathurst v. *Macpherson*, (1879) 4 App. Cas. 256, and dicta in *Municipal Council of Sydney* v. *Bourke*, [1895] A. C. 433, explained.

A sewer was constructed with due care and of proper materials by private persons under a high road. Subsequently the sewer became vested in the defendants as the local sanitary authority by virtue of s. 13 of the Public Health Act, 1875; and by ss. 15 and 19 the duty of repairing it and keeping it so as not to be a nuisance was imposed upon them. Owing to the mortar in one of the joints of the sewer having been worked away by rats a cavity was formed below the surface of the road; but the existence of that cavity was not known to and could not by the exercise of reasonable care have been discovered by the defendants. The plaintiff's horse, whilst passing along the road, broke through

SEWERS—*continued.*
the crust of the road into the cavity, and was injured:—
Held, that the defendants were not liable. LAMBERT *v.* LOWESTOFT CORPORATION
Lord Alverstone C.J. 590

—— New street—Metropolis Management Acts
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—— Rateability—Underground sewers—Diminution in value of surface - - 406
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SHIPPING—*Bill of Lading—Description of Goods—"Marked and Numbered as in the Margin"—Mistake—Bills of Lading Act*, 1855 (18 & 19 *Vict. c.* 111), *s.* 3.

By a bill of lading signed by the shipowners' agents goods shipped for carriage from New Zealand to London were described as a certain number of frozen carcases of lambs "marked and numbered as in the margin." The carcases were described in the margin of the bill of lading as bearing a certain mark and a number consisting of three figures. The mark indicated the quality of the carcase, as being of a particular brand; one figure of the number indicated approximately its weight; and the other two figures of the number were private marks of the shippers, which indicated certain particulars with regard to the carcase for their own purposes, but had no bearing on the nature, quality, or commercial value of the goods. The bill of lading contained a clause stating that the ship would not be responsible for correct delivery, unless each package was distinctly, correctly, and permanently marked by the merchant before shipment with a mark and number or address. The mark and number mentioned in the margin of the bill of lading were inserted by the shippers. On the discharge of the ship in London it was found that a portion of the carcases in fact shipped under the bill of lading bore a mark and number which corresponded with the description in the margin of the bill of lading as regards the mark, and the figure indicating weight, but which differed from that description as regards one of the figures forming the private marks of the shippers. An indorsee of the bill of lading for valuable consideration refused to take delivery of these carcases as forming part of his shipment, and sued the shipowners' agents for short delivery, relying on the provisions of the Bills of Lading Act, 1855, s. 3:—

Held, by the Court of Appeal (affirming the judgment of Kennedy J., [1900] 1 Q. B. 714), that the action was not maintainable:—

By A. L. Smith M.R.: The case came within the clause of the bill of lading which exonerated the ship from responsibility for correct delivery unless the goods were correctly marked and numbered.

By Collins L.J. and Romer L.J., A. L. Smith M.R. dissenting: Inasmuch as the figure, in respect of which there was a discrepancy between the marginal description and the number on the carcases, did not affect or denote the nature, quality, or commercial value of the goods, the defendants were not precluded by s. 3 of the Bills of Lading Act, 1855, from shewing that there was a mistake in the marginal description, and that the goods refused by the plaintiff formed a portion of those in fact shipped under the bill of lading of which the plaintiff was indorsee. PARSONS *v.* NEW ZEALAND SHIPPING COMPANY
C. A. 548

—— Quay—Machinery used in loading from—Workmen's compensation - - 20
See EMPLOYER AND WORKMAN. 7.

—— Quay, Ship alongside of—"Factory"—"Undertakers"—Workmen's compensation - - - - - 35
See EMPLOYER AND WORKMAN. 5.

SOLICITOR—*Misconduct—Administration Actions—Agreement to share Profit Costs between Solicitors who represent Different Conflicting Interests.*

It is an improper practice for solicitors, acting for parties in an administration action, to share the profit costs of other solicitors introduced by them to act for other parties in the action whose interests conflict with those of the introducers' clients, and all the solicitors who engage in such a transaction are guilty of misconduct punishable by the Court. *In re* FOUR SOLICITORS. *Ex parte* INCORPORATED LAW SOCIETY - Div. Ct. 187

—— Formâ pauperis, Plaintiff suing in—Solicitor, Assignment of—Official solicitor 596
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See REVENUE. 7.

STATUTE—*Construction—Exemption from Taxes and Assessments—City of London—Consolidated Rate—7 Geo. 3, c. 37, s. 51—City of London Sewers Act*, 1848 (11 & 12 *Vict. c. clxiii.*), *s.* 169.

Sect. 51 of 7 Geo. 3, c. 37, provides that certain lands in the City of London, reclaimed from the Thames, should vest in the adjoining owners "free from all taxes and assessments whatsoever."

The City of London Sewers Act, 1848, authorized the collection of a consolidated rate. Some of the objects to which the rate was to be applied were of a kind for which rates were made at the time of the passing of the Act of George III., but others were new. On appeal against an assessment to the consolidated rate made on land reclaimed under the Act of George III.:—

Held, that the exemption applied only to then existing taxes and assessments, or others substituted for them, and that the consolidated rate, although it included some purposes for which rates were made when the exemption was created, was substantially a new assessment, and was therefore not within the exemption.

Judgment of Divisional Court, [1900] 2 Q. B. 581, affirmed. SION COLLEGE *v.* LONDON CORPORATION - - - - - C. A. 617

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STATUTORY RULES AND ORDERS—*Validity—Condition Precedent—Order of Secretary of State—Notice of making of Order—Coal Mines Regulation Act*, 1896 (59 & 60 *Vict. c.* 43), *s.* 6.

By s. 6 of the Coal Mines Regulation Act, 1896, "a Secretary of State on being satisfied that any explosive is or is likely to become dangerous, may, by order, of which notice shall be given in such manner as he may direct, prohibit the use thereof in any mine, or in any class of mines, either absolutely or subject to conditions. . . ."

Upon the hearing of a summons against the manager of a mine for contravention of an order purporting to be made by a Secretary of State under the above section, a Queen's printers' copy of the order was put in evidence; but no evidence was given of any notice by the Secretary of State of the making of the order or of any direction by

STATUTORY RULES AND ORDERS—*continued.*
him as to the manner in which notice of the order should be given:—

Held, that the provisions as to the giving of notice were directory only, and were not conditions precedent to the coming into operation of the order, and that the order of the Secretary of State was therefore valid and binding. JONES *v.* ROBSON - - - - - Div. Ct. 673

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TRADE-MARK — *Merchandise Marks* — "*Trade Description*"—*Unintelligible Writing explained by Oral Statement*—*Merchandise Marks Act*, 1887 (50 & 51 *Vict. c.* 28), *s.* 3.

Although upon a sale of goods a purely oral indication of the country of their production will not amount to a trade description within the meaning of the Merchandise Marks Act, 1887, any writing or mark, however unintelligible without explanation, will, if orally explained by the vendor at the time of sale to be intended to indicate a particular country as the country in which the goods were produced, constitute a sufficient trade description for the purposes of the Act.

The appellant went into the shop of the respondent, a dealer in foreign meat, and asked for a leg of New Zealand mutton. The respondent handed him a leg of mutton, at the same time stating that it was New Zealand meat. The respondent also handed him an invoice in which the meat was described simply as a leg of mutton. The appellant then asked the respondent to mark on the invoice that it was New Zealand meat; whereupon the respondent wrote on it the letters "N. M." intending thereby to represent that the

TRADE-MARK—*continued.*
mutton was New Zealand mutton. No evidence was given that those letters bore that meaning according to any custom of the trade:—

Held, that under the circumstances the letters "N. M." amounted to a trade description of the meat within *s.* 3 of the Merchandise Marks Act, 1887, notwithstanding the absence of any trade custom as to their meaning. CAMERON *v.* WIGGINS Div. Ct. 1

TRADE UNION—*Registered Name*—*Right to sue or be sued in Registered Name*—*Trade Union Act*, 1871 (34 & 35 *Vict. c.* 31)—*Trade Union Act*, 1876 (39 & 40 *Vict. c.* 22).

A trade union, registered under the Trade Union Acts, 1871 and 1876, cannot be sued under its registered name. TAFF VALE RAILWAY COMPANY *v.* AMALGAMATED SOCIETY OF RAILWAY SERVANTS - - - - C. A. 170

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VACCINATION—*Neglect to procure*—*Information*—*Period at which Offence complete*—*Limitation of Time* — *Vaccination Acts*, 1867, 1871, 1898 (30 & 31 *Vict. c.* 84, *s.* 29; 34 & 35 *Vict. c.* 98, *s.* 11; 61 & 62 *Vict. c.* 49, *s.* 1).

The appellant was convicted on an information, laid on July 12, 1900, under the Vaccination

VACCINATION—*continued.*

Act, 1867, s. 29, charging him that, being the parent having the custody of a child born on December 30, 1898, he did unlawfully neglect to cause the child to be vaccinated within six months after birth, not rendering a reasonable excuse for his neglect.

On May 1, 1899, the public vaccinator visited the appellant's house, pursuant to notice, and offered to vaccinate the child, and vaccination was refused.

On July 7, 1899, the vaccination officer served a notice, under the Vaccination Order, 1898, on the appellant, requiring him to have the child vaccinated within fourteen days. No certificate of postponement or successful vaccination was received in respect of the child.

The appellant objected that the information was out of time, having been laid more than twelve months after the offence was committed. The justices disallowed the objection, on the ground that the offence was complete, and the time began to run, on July 21, the date of the expiration of the notice served on the appellant by the vaccination officer.

On a case stated:—

Held, that the offence was complete, and the time began to run, six months after the birth of the child, and the information was out of time. LANGRIDGE *v.* HOBBS - - **Div. Ct. 497**

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WAGERING—Agreement by way of gaming or —Gambling partnership—Bets paid by one partner—Claim for contribution **11**
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WILL—*Farming Stock—Gift for Life—Things quæ ipso usu consumuntur—Construction of Will.*

Farming stock and implements of husbandry are not things quæ ipso usu consumuntur, and a bequest of them for life does not confer upon the legatee an absolute interest in them, even though the legatee takes no interest under the will in the farm itself in connection with which they were used. MYERS *v.* WASHBROOK **Div. Ct. 360**

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